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TESTIMONIAL CONSISTENCY: THE HOBGOBLIN OF THE FEDERAL FALSE DECLARATION STATUTE

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INTRODUCTION

When a witness testifies inconsistently with his former testimony, any one of several things might be happening. The witness might be expressing a change in his memory or understanding of the events about which he is testifying, the witness might be correcting an intentional falsehood in the former testimony, or the witness might be lying. Because inconsistent testimony *per se* is neither harmful nor beneficial to the judicial process, the law has no apparent reason to deter a witness from testifying inconsistently with his former testimony. Yet, inconsistent testimony is penalized under federal perjury law. This article questions the wisdom of such a rule.

A perjury statute cannot be judged in isolation from the judicial system in which it functions. In the American adversary trial process, evidence is taken through factual narratives that unfold during trial examination. Attorneys from one side, then from the other, ask witnesses questions designed to elicit favorable testimony. A witness's story is not told all at once but in bits and pieces over time. Under cross-examination the witness is asked to test his first account against his memory, common knowledge, or the examiner's suggestions. As a result of cross-examination, a witness's recollection or understanding of events may change, even as he testifies. An ability to explain, revise, or even to disavow former testimony is implicit in the adversary examination as presently structured.

As presently formulated and construed, the federal perjury laws unrealistically ignore the needs of the adversary trial process by mandating a sort of "foolish consistency" in trial and grand jury testimony. Witnesses who change their testimony for any reason are jeopardized by a statute that deems inconsistent testimony to be *prima facie* evidence of perjury. Simultaneously, the law appears to invite witnesses to correct testimonial errors, promising immunity from prosecution if they do. In reality, the promise is empty. The provisions are not merely theoretically incoherent, they are counterproductive as well. To inhibit inconsistent testimony is to inhibit truth as well as falsehood. A rule mandating consistency in testimony costs more than it is worth as a deterrent to perjury.

This article focuses on the inconsistent statement provision of the Federal False Declaration Statute. Part I of this article identifies certain

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anomalous aspects of perjury that make it particularly difficult to control by threats of punishment. Perjury's resemblance to innocent mistake creates a risk that criminal sanctions will be misapplied. These sanctions may have counterproductive effects, at times inducing people to commit perjury and at others inhibiting people from correcting inaccurate testimony that they have previously given. Part II demonstrates the way in which the conflict between the goals of deterrence and mitigation is manifested in the federal perjury laws, which seek both to penalize "inconsistent" testimony and to encourage "recantation" of incorrect testimony. Statutory restrictions and judicial construction have resolved this conflict against mitigation. Part III describes the harmful effects of this statutory policy on witnesses and the attorneys who represent them. It also questions the strategic value of the inconsistent statement provision to federal prosecutors. Part IV offers a recommendation for a more coherent statutory policy toward inconsistent testimony and evaluates that recommendation in light of the regulatory problems identified in Part I. It concludes that federal law should more liberally encourage corrections of prior testimony even at the cost of some additional loss in deterrence.

I. A BRIEF EXAMINATION OF SOME PROBLEMS IN REGULATING PERJURY

The crime of perjury tends to resist analysis under the traditional criminal law model of deterrence. Deterrence theory assumes that people will refrain from criminal activity if they know that criminal acts will be met with swift and certain punishment. In its modern, economic incarnation, deterrence theory sees the potential criminal as a rational economic actor capable of calculating the costs and benefits of different courses of conduct.¹ Such a theory posits that if such an actor concludes

1. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 205-06 (3rd ed. 1986); Posner, *An Economic Theory of the Criminal Law*, 85 *COLO. L. REV.* 1193 (1985). This analysis also assumes that the criminal is risk neutral, accurately informed about the relevant factors, and can do his math correctly.

Perjury laws find their economic justification in the costs that false testimony imposes on the litigation system. Perjured testimony, if it succeeds in its objective, misleads the trier of fact into inaccurate judgments, which in turn result in injustice and in social costs. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* at 514. The possibility of perjury also increases the transaction costs associated with litigation. In the absence of any sanction against perjury, litigants and triers of fact would be driven to seek more complete, and thus more costly, corroboration of witnesses' testimony.

To act as a deterrent, perjury laws must impose risks that offset the benefits that witnesses may anticipate from the commission of perjury. The potential perjurer who thinks like a risk-neutral economist or gambler will forego perjury when his estimate of the cost of the penalty multiplied by what he perceives to be the likelihood of its imposition (the "cost product") exceeds his estimate of the product of the value to him of what perjury would bring about, multiplied by the perceived likelihood that the perjury will bring the benefit about (the "benefit product"). Increasing the cost product by increasing the sanctions or by increasing the likelihood of their imposition should decrease the amount of perjury committed. When the benefit product is large, as it may be for witnesses who are criminal defendants facing capital charges, it is unlikely that increasing the cost product will decrease perjury.

The potential perjurer's actual calculation of potential costs and benefits can be a bit more complex than this description suggests because of a form of reciprocal relationship

that the costs to him of conviction multiplied by the likelihood of conviction exceed the product of the crime's benefits to him multiplied by the likelihood that he will realize such benefits, he will refrain from committing the crime. Lawmakers can alter the costs of conviction by changing the penalties for conviction. They can alter the probability of conviction by changing the elements of the offense. Applied to perjury, then, the assumptions of deterrence theory imply that increasing the cost or probability of conviction of perjury will lead to a reduction in the occurrence of the offense, making trial testimony more truthful and judgments more reliable.

Several phenomena make application of the deterrence model to perjury problematic. Evidence tending to prove the *actus reus* of perjury is often ambiguous, making perjury difficult to distinguish from innocent behavior. Depending on its response to this problem, the law of perjury risks over or under-deterrence. The cost/benefit analysis of the deterrence model is also complicated by the tendency of perjury laws that penalize inconsistent testimony to dissuade witnesses from mitigating the effects of prior perjury or innocently incorrect testimony. The following subsections discuss these phenomena.

A. *The Problem of Detection*

Perjury at common law is the willful making of a false oath about a material fact in a judicial proceeding.² Although the crime of perjury occurs under the very nose of the judicial system, its detection and punishment have always presented serious difficulties. The theory of deterrence requires that the trier of fact be able to identify the proscribed

between the cost product and the value component of the benefit product. The value of the perjury to the witness will depend in part upon the likelihood that the jury will believe him. Anything that makes the perjury more believable will increase its value and increase the incentive to lie, up to a limit represented by the potential gain represented by a favorable judgment or the loss represented by an unfavorable one. The believability of the perjury will depend in part on the jury's estimate of the witness's perception of the risk of punishment if he is caught lying. Thus prosecutors argue in capital cases that a defendant who testifies has nothing to lose by perjury: the cost product will exceed any benefit product. This calculation leads to an anomaly: the greater the likelihood of punishment, the more likely the jury is to believe the witness, and the greater the incentive he has to lie. That is, the increased risk of punishment makes it more likely that the jury will believe the lie, increasing the value of the lie. The risk would, for the same reason, also tend to decrease the likelihood of a perjury conviction, reducing the risk component of the cost product.

But there are wheels within wheels. A rational jury would take this increased incentive into consideration and would both discount the cost product and increase its estimate of the benefit product. The jury's reaction would reduce the witness's incentive to commit perjury. A rational witness, however, would know that the jury would discount the credibility of his testimony in this way. This knowledge, which of course a rational jury will foresee, once again makes his testimony more credible. But if the jury takes this into account, etc. This endlessly oscillating, reciprocal relationship suggests that even if all the actors are rational, the effect of an increased risk of punishment will depend on indeterminate interactions among the actors. See Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1280-84 (1985).

2. See *infra* note 16. Additional elements not pertinent to the discussion here are that the matter be material and that the statement be given in a judicial proceeding.

behavior reliably in order to avoid over or under-deterrence.³ Optimal enforcement of perjury laws requires an accurate way of identifying perjurious statements and distinguishing them from innocent testimonial inaccuracies. Unfortunately, the chief objective manifestation of the crime of perjury, the falsity of a witness's sworn statement, is a common characteristic of innocent behavior or even behavior that the justice system should encourage.⁴

The giving of false evidence can be wholly innocent. False evidence can result from truthful testimony about inaccurate observation, memory lapse, misunderstanding, or miscommunication. A witness who misperceived an event may truthfully testify to his misperception. A forgetful witness may truthfully describe his inaccurate recollection of an event. A witness who misunderstands a question may truthfully answer the question that he thought he heard. In some of these instances, the witness might even be said to have "known" the truth at the time he testified falsely. Yet in none of them has the witness willfully made a false oath. Mere falsity of the witness's statement furnishes an inadequate inference of perjury.

An arguably more obvious manifestation that a witness intentionally lied is that he made inconsistent sworn statements. Here, it would seem, the inference of intentional lying is stronger than that resulting from mere falsity because in making one of the statements, the witness seems to acknowledge that he knows the other to be false. Yet, inconsistent statements alone are insufficient to support an inference of perjury. A witness will testify inconsistently whenever he corrects any of the innocent testimonial errors noted in the preceding paragraph.

The difficulty of identifying perjury creates a risk that perjury laws will result in overdeterrence if they identify and penalize ambiguous behavior or inconsistent statements, as a substitute for the behavior sought to be regulated, intentional lying. As will be seen, federal perjury law has adopted this strategy.

B. *The Problem of Counterproductivity*

Haldeman: [Speaking hypothetically] But Magruder then says . . . "Now, I go down to the Grand Jury, because obviously they are going to call me back, and I go to defend myself against McCord's statement which I know is true. . . . You're saying to me, 'Don't make up a new lie to cover the old lie.' What would you recommend that I do? Stay with the old lie and hope I would come out, or clean myself up and go to jail?"⁵

3. See R. POSNER, *supra* note 1, at 514. Over-deterrence refers to the inhibition of nontargeted behavior by the threat of punishment; under-deterrence refers to the failure of the threat of punishment to deter all of the targeted behavior.

4. In a sense, the very nature of the trial process implies that false testimony must be and remain commonplace. The *raison d'être* of a trial is to resolve conflicting accounts of events by announcing a form of public truth, a finding of fact. Such a finding necessarily implies that some of the conflicting evidentiary accounts are "false." In this sense, trials are replete with evidence that is later regarded as having been false, but not perjurious.

5. THE WHITE HOUSE TRANSCRIPTS 246 (G. Gold ed. 1974).

Laws that punish lying often have unpredictable effects. Threats to punish lying sometimes induce people to lie precisely in order to avoid the punishment for lying, as in the quoted example.⁶ This paradoxical risk is most pronounced whenever the witness is asked to acknowledge that prior testimony was inaccurate, e.g. during cross-examination. If inconsistent testimony increases the likelihood of punishment, the witness who realizes that her original testimony was inaccurate will have an incentive to lie on cross-examination whether or not the original response was perjurious. Unlike most other criminal laws, perjury statutes can create a perverse incentive to commit the very act they forbid. As a corollary, they are also unusually⁷ counterproductive in deterring witnesses from engaging in the forms of inconsistent testimony that the judicial system wishes to encourage. Inconsistent testimony is often a sign of *bona fides* rather than duplicity. Testimonial revisions are the natural concomitant of candor and are often essential to the development of evidence at trial.

This potential for counterproductivity precludes a simple reliance on the assumption that maximizing the penal costs imposed on perjury will necessarily inhibit it: such "disincentives" might actually be incentives. Increasing their severity might well increase the incidence of the harm they are intended to prevent.⁸ Any perjury prevented by an increase in punishment must be additionally discounted by the value of the useful testimonial corrections that such punishment inhibits.

6. In economic terms, a lie may reduce the witness's chances of being apprehended and convicted of committing prior perjury. It also may reduce the witness's exposure to conviction for perjury when the witness has innocently testified inaccurately. The witness who contemplates changing previously inaccurate testimony must perform a rather complicated calculation of the probability-weighted costs he will face under each course of action, i.e. affirmation of the previous testimony or retraction of the testimony. Affirmance may decrease the chance of detection yet increase the likelihood of conviction if the lie is detected because it reduces the defendant's ability to argue that the lie was inadvertent. Retraction will have effects that vary with the legal effect of retraction, as discussed below.

7. Normally, criminal sanctions do not threaten to deter desirable behavior. Laws against murder, theft, or drug dealing, for example, rarely jeopardize or inhibit activities generally thought to be socially useful because the activities involved in those crimes rarely resemble socially useful behavior. When the behavior to be regulated itself is sometimes socially useful, regulations can, in theory, be tailored so as to permit the behavior at the optimum level. See Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 73-84 (1983); Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984) (characterizing sanctions as involving abrupt jumps in the cost of illegal activity and prices as more elastic). Even if we assume that perjury is never socially useful however, it does not follow that laws against perjury do not jeopardize socially useful activity.

8. The problems of detecting perjury make this possibility doubly perplexing because the effects of perjury statutes cannot be measured. Unlike some other crimes, occurrences of perjury cannot be quantified. Without data on the relative effects of the counterproductive potential, we cannot tell whether the benefits of an increased likelihood of conviction will exceed the costs. The lack of any data on the ratio of punishment to occurrence makes it impossible for either the perjurer or the legislator to engage in classic risk/benefit analysis that is central to the instrumentalist calculus. "Proof" of the relative effectiveness of various forms of the perjury statute must therefore proceed by argument based on speculation and anecdote. In this respect, we have not advanced much since Holmes' plaintive question: "What have we better than a blind guess to show that the criminal law in its present form does more good than harm?" O.W. HOLMES, *The Path of the Law*, COLLECTED LEGAL PAPERS 180 (1920).

C. *The Problem of Deterrence versus Mitigation*

Conflict between the goals of deterrence and mitigation is inevitable in any criminal statute. The more effective a criminal statute is in deterring conduct through the threat of swift and certain punishment, the more such a statute inhibits people who have engaged in the conduct from admitting it so as to minimize the damage caused by the conduct. With some crimes, this loss of mitigation is negligible in relation to the value of deterring the conduct. Thus, it is presumably more important to deter murder than it is to encourage confessions of murder because a confession does little to remedy the harm caused by the act.⁹ One cost of severe sanctions against murder may well be to increase the costs of investigation of such crimes but this cost is thought to be outweighed by the value of the deterrence purchased by those sanctions.

Perjury does not yield to such simplistic analysis. Although the crime of perjury is complete when the witness makes the false statement, perjury usually does not cause serious harm until a tribunal acts in reliance on the false statement. Such harm can be largely obviated if the perjury is corrected before the tribunal acts. Thus, in most cases there is a window of time after the perjury is committed and before the tribunal acts during which the harm can be mitigated. The judicial system has a strong institutional interest in encouraging witnesses to correct perjurious statements before tribunals act in reliance on them. In addition, as noted in the preceding subsection, the judicial system also has an even greater interest in encouraging the correction or mitigation of innocently inaccurate testimony.

Yet, to give witnesses an opportunity to correct perjury and thereby avoid punishment weakens the deterrent effect of sanctions against perjury and could increase the incidence of the crime and its associated costs. Witnesses might be more inclined to make the initial decision to commit perjury under a rule that permitted them to correct the perjury without risk of punishment.¹⁰

Because maximum punishment for intentional lying will always interfere with maximum incentives to correct lies, as well as innocent errors, any perjury rule must mediate the conflict between the institutional goals of deterrence and mitigation. The conflict is clearly apparent in the federal perjury statutes.

II. THE FEDERAL PERJURY STATUTES

Two federal statutes prohibit the giving of intentionally false testimony in federal trial and grand jury proceedings: the General Perjury

9. Where social gain can be seen from the defendant's mitigation of the effects of his criminal behavior, the law does encourage such mitigation, as in the defense of withdrawal in the law of attempt. See MODEL PENAL CODE § 5.01(4) and accompanying Comment (defense offers defendants a motive to desist from criminal designs); Rotenberg, *Withdrawal as a Defense to Relational Crimes*, 1962 WISC. L. REV. 596.

10. This possibility is discussed below, Part IV.

Statute¹¹ and the False Declaration Statute.¹² Considered together, these statutes create a bewildering schedule of risks and rewards for the witness who contemplates changing his testimony.

Because of the difficulty in distinguishing perjured testimony from innocent mistakes, courts have historically applied the severe sanctions of the law of perjury with caution, so as not to punish innocent behavior or unduly frighten prospective witnesses.¹³ This reluctance has, until recently, been manifested in evidentiary rules that make perjury exceptionally difficult to prove.¹⁴ The federal perjury laws illustrate both the old reluctance and a newer approach, designed to facilitate conviction.

A. *The General Perjury Statute and the Common Law Evidence Rules*

The General Perjury Statute, which derived from the common law,¹⁵ defines perjury as "willfully and contrary to . . . oath [stating or

11. 18 U.S.C. § 1621 (1982). *See infra* note 16.

12. 18 U.S.C. § 1623 (1982). *See infra* note 26.

13. *Bronston v. United States*, 409 U.S. 352, 359 (1973) ("The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common law offense: 'That the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.' *Study of Perjury*, reprinted in REPORT OF NEW YORK LAW REVISION COMMISSION, LEGIS. DOC. NO. 60, 249 (1935)); *Weiler v. United States*, 323 U.S. 606, 608-10 (1945). *See also* *United States v. Ryan*, 828 F.2d 1010 (3d Cir. 1987) (The rule that perjury convictions not be based on excessively vague or fundamentally ambiguous questions prevents witnesses "from unfairly bearing the risks associated with the inadequacies of their examiners, and . . . encourage[s] participation in the judicial system."); 7 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2041 (Chadbourn Rev. 1978) (hereinafter EVIDENCE) (citing W.M. BEST, EVIDENCE 605-06 (1849)):

Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them, — we shall see that the obligation of protecting witnesses from oppression, or annoyance by charges or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure; and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission, — such as publicity, cross-examination, the aid of a jury, etc.; and on the infliction of a severe, though not excessive punishment, whenever the commission of the crime has been clearly proved.

14. *See* discussion at Part I-A, below. Perhaps as a result of these rules, the number of prosecutions for perjury in the federal courts has been miniscule in relation to the amount of intentional false testimony that common experience tells us must take place. For example, in the ten year period from 1956 to 1965, out of 307,227 federal criminal defendants charged, only 713 were charged with perjury. The conviction rate for perjury was 52.7% in comparison to 78.7% for all other crimes. 115 CONG. REC. 5880 (1969) (remarks of Sen. McClellan). These data antedated the passage of the False Declaration Statute.

15. At common law, perjury consists of willfully making a false oath with regard to a material matter while under oath in a judicial proceeding. *See* WHARTON'S CRIMINAL LAW § 601 (C. Torcia 14th ed. 1978); R. PERKINS & R. BOYCE, CRIMINAL LAW 511 (3d ed. 1982); MODEL PENAL CODE § 241.1 Comment 1 ("In general, [perjury] consists of four elements: (i) the making or reaffirming of a false statement; (ii) that is material to an official proceeding; (iii) in violation of an oath or equivalent affirmation; (iv) when the party making the statement does not believe it to be true."). An answer that is literally true is not perjury, even if it is not responsive and arguably misleading by negative implication.

subscribing] any material matter that [the witness] does not believe to be true."¹⁶

Prosecutions under the General Perjury Statute must satisfy strict common law proof requirements. The government must prove that the witness willfully made a statement without a belief that the statement was true.¹⁷ This lack of belief must usually be inferred from the untruth of the statement.¹⁸ Federal courts have added as an element that the government prove that statement was actually untrue.¹⁹

To prove that the statement was untrue, the government must satisfy the two-witness rule, which provides that the falsity of the oath cannot be proved by the uncorroborated testimony of only one witness.²⁰

16. 18 U.S.C. § 1621. The text of the statute is as follows:

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

17. Untrue testimony is not perjurious unless the witness does not believe it to be true. 18 U.S.C. § 1621 (1982). Thus, untrue testimony is not perjury if it results from a slip of the tongue, a misunderstanding of the question, misperception, or a faulty memory. See MODEL PENAL CODE § 241.1 Comment 3. Some courts held that a sworn untruth made recklessly, or without knowledge of whether it was true, was not perjury, although most held that it was. Compare *id.* (recklessness is sufficient for guilt) with WHARTON'S CRIMINAL LAW §§ 602-03. See also *United States v. Remington*, 191 F.2d 246, 248 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952); WHARTON'S CRIMINAL LAW § 604; and R. PERKINS & R. BOYCE, CRIMINAL LAW 516-17. The general federal rule is that true testimony given under a mistaken belief that it is false is not perjury. MODEL PENAL CODE § 241.1 Comment 2(d).

18. *American Communication Ass'n v. Douds*, 339 U.S. 382, 411 (1950); *United States v. Sweig*, 441 F.2d 114, 117 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971) ("In the absence of an admission by the defendant, the only way a defendant's knowledge of the falsity of his statement can be proved is through circumstantial evidence."); MODEL PENAL CODE § 241.1 Comment 2(d) ("In the usual perjury prosecution, corroboration of an intent to lie is provided by the falsity of the statement made.").

19. *United States v. Forrest*, 623 F.2d 1107, 1110 (5th Cir.), *cert. denied*, 449 U.S. 924 (1980); *United States v. Magin*, 280 F.2d 74, 76 (7th Cir.), *cert. denied*, 364 U.S. 914 (1960). The rationale of such a requirement is that, in the absence of the corroboration of the defendant's intent established by the falsity of the statement, a significant danger exists that a conviction would be based upon jury speculation.

20. *Hammer v. United States*, 271 U.S. 620, 626 (1926). In *Weiler v. United States*, 323 U.S. 606 (1945), the Court justified retention of the two witness rule as follows:

The special rule which bars conviction for perjury solely upon the evidence of single witness is deeply rooted in past centuries. That it renders successful perjury prosecution more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an "anachronistic" rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule on the other hand, contend that society is well-served by such consequence. Lawsuits frequently engender in defeated litigants sharp resentment and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of un-

The two-witness rule thus prevents a perjury conviction based solely on a swearing match between the defendant and a single government witness.

A corollary of the two-witness rule is the inconsistent statement rule, a much-criticized rule of pleading and proof that applies when the defendant himself has made two or more contradictory sworn statements. The rule has two prongs, one applying to the indictment and one to the proof required of the prosecution. The indictment must specify which of the defendant's inconsistent statements is alleged to be false; it cannot simply charge that, as a matter of logical necessity, one of them was false.²¹ In proving the falsity of the statement charged, moreover, the prosecution must adduce some corroboration in addition to the defendant's sworn contradictory statement.²²

The extent to which these common law evidentiary rules actually

founded perjury prosecutions The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

323 U.S. at 608-10. See also *United States v. Diggs*, 560 F.2d 266, 269 (7th Cir.), cert. denied, 434 U.S. 925 (1977) (two-witness rule still applies to prosecutions under the General Perjury Statute after passage of the False Declaration Statute).

21. See *United States v. Buckner*, 118 F.2d 468, 470 (2d Cir. 1941).

22. See *Cuesta v. United States*, 230 F.2d 704, 707-08 (5th Cir. 1956) (defendant's sworn oral admission of the falsity of his sworn written application for registry as an alien was not sufficient evidence of perjury without corroboration of falsity); *United States v. Nessenbaum*, 205 F.2d 93 (3d Cir. 1953) (dictum); *McWhorter v. United States*, 193 F.2d 982 (5th Cir. 1952); see MODEL PENAL CODE § 241.1 Comment 8.

It would appear that the seminal case from which the federal rule evolved was systematically misread. *McWhorter* cited *United States v. Wood*, 39 U.S. (14 Pet.) 430, 438 (1840), for the rule that proof of defendant's contradictory sworn statements alone is insufficient to prove perjury. 193 F.2d at 983. Yet *Wood* does not support that rule. In *Wood*, the defendant was charged with perjury in preparing invoices. The proof of falsity was limited to written correspondence from the defendant. No corroborating witness testified. The Court noted the existence of the two-witness rule, but held that the purpose of the rule was satisfied by the evidence presented, which came from the defendant himself. In dictum, the Court cited *Rex v. Knill* (referred to in *Rex v. Harris*, 5 Barn. & Ald. 926, 929 (1822)) for the rule that a single witness is sufficient to establish perjury if he testifies that the defendant testified to contradictory statements. In *Knill*, the defendant was charged with having committed perjury in testimony before the House of Lords. The defendant had testified inconsistently before a committee of the House of Commons. The evidence was limited to proof of the contradictory oaths. The conviction was affirmed despite the absence of a second witness, the court holding that contradiction by the party himself was sufficient. In *Rex v. Harris*, the court reversed a conviction upon similar facts because the prosecution had not specified in the charge which of the two statements was false, but had simply alleged that they were inconsistent and that one or the other must have been false. The *Harris* court reasoned that the ambiguity of the charge would not permit the defendant to plead acquittal in the suit as a bar to a subsequent charge of having committed perjury in making one or the other of the statements alone.

Although *United States v. Wood* does not establish that a defendant's sworn contradictory statements alone are insufficient to prove the falsity of his testimony, post-*Wood* decisions in England did hold that the defendant's sworn inconsistent statement alone was insufficient to satisfy the two-witness rule. *R. v. Wheatland*, 8 C.& P. 238 (1838); see generally 11 HALSBURY'S LAWS OF ENGLAND § 950 (4th ed. 1976) and cases cited therein; 12 HALSBURY'S STATUTES 192 (4th ed. 1985) (Perjury Act of 1911 § 13). However, *McWhorter* and its progeny apparently ignored the effect of the rules announced in *Wood*, i.e. that, although the prosecution is required to charge and prove which of the two inconsistent statements was false, once the prosecution charges that one of the statements is false, the

impair federal prosecutions for perjury is uncertain. Critics of the General Perjury Statute have argued that the two-witness rule and the inconsistent statement rule seriously impede federal prosecutions.²³

The rules have also been subject to theoretical challenge. Discounting any special problem in regulating perjury, critics argue that the two-witness rule requires corroboration that is unnecessary for proof of other, more serious, crimes.²⁴ They see the inconsistent statement rule as pointlessly forcing the prosecutor and the jury to guess which statement was false when, as a matter of logic, one of them must have been.²⁵ From the critics' point of view, prosecutorial efficiency and logic triumphed with the passage of the False Declaration Statute.

B. *The False Declaration Statute*

The False Declaration Statute prohibits false swearing in federal court and grand jury proceedings.²⁶ Congress enacted the statute as part of the Organized Crime Control Act of 1970 with the announced intention of making perjury convictions easier to obtain than they had been under the General Perjury Statute,²⁷ thereby improving the reliability of evidence given in federal court and grand jury proceedings

defendant's contradictory statement is sufficient under the two-witness rule to establish falsity.

The inconsistent statement rule was not followed in several state cases, and Wigmore opined that it was not the prevailing rule in non-federal jurisdictions. WIGMORE, EVIDENCE § 2042.

Just as the two-witness rule acquired a new rationale after its original rationale withered away, *Cf.* O.W. HOLMES, THE COMMON LAW 32 (M. Howe ed. 1963) ("[W]hen ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them . . .") the inconsistent statement rule also finds support in other arguments. One such justification is that inconsistent statements do not necessarily imply perjury. A witness may testify inconsistently at different times because his recollection or opinion changed in the interim or because of mistake or misunderstanding. Mere proof that the defendant testified inconsistently does not establish that he made either statement without a belief that it was true. Despite this justification, however, the inconsistent statement rule might prove frustrating in rare cases in which the nature of the inconsistency makes it clear that the witness uttered an intentional falsehood but the prosecution has no independent proof as to which of the statements was false in order to satisfy the two-witness rule.

23. As evidence they cited the relative paucity of federal prosecutions for perjury.

24. See WIGMORE, EVIDENCE § 2041 ("In modern times, cogent reasons have been given for believing that the rule has outlived its usefulness."); *New York Law Revision Commission, 1935 Report*, Legis. Doc. 322 (1935).

25. See *United States v. Goldberg*, 290 F.2d 729, 734 n.1 (2d Cir.), *cert. denied*, 368 U.S. 899 (1961) ("It is hard to see why in a case where, e.g., two or more witnesses testified that the defendant, repeatedly and under varying circumstances, had made statements differing from his sworn testimony, a jury could not be convinced beyond reasonable doubt that the defendant did not believe that latter to be true."). See also, WIGMORE, EVIDENCE § 2043; MODEL PENAL CODE § 241.1 Comment 9.

26. 18 U.S.C. § 1623 (1982). Subsection (a) provides as follows:

(a) Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

The statute also prohibits the use of false documents in federal court and grand jury proceedings. This article will discuss only the provisions relating to false swearing. It could be argued that the use of false documents evidences a greater degree of conscious intention to mislead and so is not subject to the problems discussed in this article.

27. See *infra* note 125 and accompanying text.

against organized crime figures.²⁸ The False Declaration Statute was to make convictions for perjury more easy to obtain by defining a new species of perjury, false declaration, to which the "outmoded" evidentiary rules of the General Perjury Statute would not apply.²⁹ The premise of the legislation was simple: by increasing the likelihood that a perjurer would be convicted, the statute would increase the risks associated with perjury and thereby reduce its occurrence.³⁰ It is, of course, this premise that is in doubt, given the potential counterproductivity of perjury statutes.

The elements of the False Declaration Statute are as rigorous as those of the General Perjury Statute, although there are some changes in operative language. The False Declaration Statute prohibits a federal witness from knowingly³¹ making a "false declaration." The defendant

28. *Id.*

29. See *supra* note 14. "Title IV eliminates outmoded evidentiary restrictions in prosecutions of those who give false testimony in grand jury or court proceeding [sic]." *Hearings Before the Sub-Committee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292, 91st CONG. 1ST SESS. 3 (1969) [hereinafter *Hearings*] (remarks of Sen. McClellan).*

30. In committee hearings, witnesses favoring the legislation testified that if the government could more easily obtain convictions for perjury, witnesses would be less likely to succumb to illicit pressure to testify falsely. Government prosecutors were said to have been often frustrated by witnesses who testified favorably to the government in grand jury proceedings, then changed their story because of intimidation or for other reasons at the ensuing criminal trials. The government wanted its own counter-pressure, a licit threat with which to confront the wavering witness. In addition, it was argued that making perjury convictions easier to obtain would permit the government to enforce the immunized witness's obligation to testify truthfully under the Act's witness immunity provisions. The immunity provisions contained in the Organized Crime Control Act of 1970 are found at 18 U.S.C. § 6002 (1986). It was thought that facilitation of perjury prosecutions was essential to insure truthful testimony by immunized witnesses:

The criminal law must offer more effective deterrents against false statements. The integrity of the trial depends on the power to compel truthful testimony and to punish falsehood. Immunity can be an effective prosecution weapon only if the immunized witness then testifies truthfully. Perjury statutes provide criminal penalties for false testimony under oath, but the infrequency of their use and the difficulty of securing convictions in perjury cases has limited the effectiveness of this criminal sanction.

REPORT OF THE PRESIDENT'S CRIME COMMISSION, *The Challenge of Crime in a Free Society* (quoted in *Hearings*, *supra* note 29, at 335).

31. The legislative history suggests that the change in the level of intent from "willfully" to "knowingly" was intended to have no substantive effect. See S. REP. NO. 617 at 149 ("language changes have been made in the provision [on intent] as introduced to achieve economy of words"). Compare *United States v. Stassi*, 443 F. Supp 661, 666 (D.N.J. 1977), *aff'd*, 583 F.2d 122 (1978) (rejecting defendant's argument that his statements were not knowingly false, the court said: "the *mens rea* element of 'knowingly' does not apply to whether the statements were false but rather to how they were made. (citations omitted). The requirement dictates that only knowing, intentional or voluntary (as opposed to inadvertent or accidental) statements be the subject of prosecution.") and *United States v. Watson*, 623 F.2d 1198, 1206 (7th Cir. 1980) (upholding refusal to give jury instruction that false declaration must be willful) with *United States v. Gross*, 511 F.2d 910, 914-15 (3d Cir.), *cert. denied*, 423 U.S. 924 (1975) (noting that the *mens rea* element was changed, without comment on the substantive effect of the change) and *United States v. Lardieri*, 497 F.2d 317, 320 (3d Cir. 1974) (approving instruction for prosecution under subsection (a) stating that "knowing" means with knowledge of the falsity of the statement). This question will be discussed further in Part II-A.

In contrast to the General Perjury Statute, 18 U.S.C. § 1621 (1982), the witness's "be-

must have knowledge of the falsity of the statement.³² Consistent with prior law, the statute explicitly requires the prosecution to prove that the matter asserted in the defendant's statement was objectively false.³³ The lightening of the prosecutor's burden occurred not in the elements of the crime but in the evidentiary rules.

1. Relaxation of Evidentiary Rules

Subsection (e) of the statute abandons the two-witness rule altogether by providing that proof of false declaration need not be by any particular number of witnesses or type of evidence.³⁴ The government need only prove the elements of the crime beyond a reasonable doubt.

This section permits proof of the falsity of the defendant's testimony to be established by the uncorroborated testimony of a single witness, making proof of false declaration similar to that of most other crimes. In theory, subsection (e) also permits a conviction based solely on an inconsistent statement made by the defendant, whether sworn or not, if evidence of such a statement would permit the trier of fact to find the sworn statement to have been false beyond a reasonable doubt.

While the foregoing provision permits the government to convict a defendant of false declaration based solely on the witness's inconsistent statement, it does not solve the problem presented by the need to choose which of two inconsistent statements is charged to be false. This matter is taken up in subsection (c) of the statute, which lessens the government's pleading and proof requirements in cases in which the defendant has made inconsistent statements under oath. Under the statute, an indictment or information sufficiently charges false declaration by alleging that the defendant knowingly made two or more sworn declarations "which are inconsistent to the degree that one of them is necessarily false"³⁵ The prosecution need not allege which of the statements was false. Likewise, at trial the prosecution need not prove which of the two inconsistent declarations was false.³⁶ Proof of their inconsistency alone is sufficient to establish that at least one of them was false.³⁷

2. Defenses

The False Declaration Statute provides for two defenses to charges

lief" in the truth of the statement is referred to only once, in the inconsistent statement provision discussed below.

32. *United States v. Dudley*, 581 F.2d 1193 (5th Cir. 1978). *But see infra* Part II-C-1-a (discussion of the inconsistent statement provision in which such knowledge may not need to be proved when the witness has testified inconsistently).

33. *United States v. Smith*, 538 F.2d 159 (7th Cir. 1976).

34. "Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence." 18 U.S.C. § 1623(e) (1982).

35. 18 U.S.C. § 1623(c) (1982).

36. *Id.*

37. *Id.* This provision reverses the *McWhorter* rule.

made under the statute. As an incentive to correct false testimony,³⁸ the statute permits an affirmative defense of recantation to a charge of false declaration. Recantation, or retraction, refers to the witness's statement that his previous testimony was false. A defense of retraction or recantation was not recognized under the General Perjury Statute. Although some common law decisions barred conviction for perjury if the defendant had corrected the falsehood in the same proceeding in which it had been given,³⁹ in *United States v. Norris*,⁴⁰ the Supreme Court held that the crime of perjury was "completed" at the time of the false utterance and that recantation was no defense to a charge of perjury under the federal statute.⁴¹

Subsection (d) changes the Norris rule for the crime of false declaration:

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.⁴²

The recantation provision was modeled on a similar provision in the New York criminal code.⁴³ The Model Penal Code contains a similar retraction provision.⁴⁴ Under both the New York and Model Penal Code perjury statutes, the defense, if successful, bars prosecution for perjury. But because the False Declaration Statute did not displace the General Perjury Statute, the defense afforded by its recantation provision does not apply to prosecutions under the General Perjury Statute.⁴⁵

The statute provides an additional affirmative defense to a charge of having made inconsistent sworn statements. This defense is set out in subsection (c) which provides that it "shall be a defense to an indictment

38. "[The recantation provision] serves as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution by doing so." 2 U.S. CODE CONG. & ADMIN. NEWS 4024 (1970). See also same source at 4008, 4023 (the sole purpose of the recantation defense is to encourage the discovery of truth in judicial and grand jury proceedings) *United States v. Moore*, 613 F.2d 1029 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980); *United States v. Lardieri*, 506 F.2d 319, 324 ("Section 1623 deters perjury in the first instance by punishing it, and encourages the correction of false testimony by barring prosecution if a witness recants before he knows his lie will be exposed or before the proceeding has been substantially affected.") *United States v. Denison*, 663 F.2d 611, 617 (5th Cir. 1981).

39. See WHARTON'S CRIMINAL LAW § 627 and cases cited therein.

40. 300 U.S. 564, 574-76 (1937).

41. *Id.*

42. 18 U.S.C. § 1623(d) (1982).

43. This provision adopts in modified form a New York statute, N.Y. PENAL LAW § 210.25 (McKinney, 1988); 2 U.S. CONG. & ADMIN. NEWS, 4023-24 (1970).

44. "No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding." MODEL PENAL CODE, § 241.1(4) (1980).

45. See *infra* notes 118-19.

or information made [under subsection (c)] that the defendant at the time he made each declaration believed that the declaration was true."⁴⁶ The relationship between this defense and the government's affirmative obligation to prove that the defendant knowingly made a false statement is discussed in the next subsection.

C. *Treatment of Inconsistent Testimony Under the Federal Perjury Statutes*

As part I of the article suggested, perjury is difficult to regulate in part because of the conflict between the deterrence and mitigation goals of the justice system: to inhibit perjury is to discourage rectification of testimonial error. Inconsistent testimony is especially sensitive to this conflict because, although it can provide strong evidence of perjury, it is nevertheless the only way in which a witness can correct the harm done by his previous testimony. As one would expect, therefore, the deterrence and mitigation interests of perjury law clash most clearly in the statutory treatment of inconsistent testimony.

The two federal perjury statutes treat inconsistent testimony in opposite ways. Under the General Perjury Statute, the two-witness rule and the inconsistent statement rule tend to make testimonial correction less risky for a witness. The government may charge that either statement was perjurious, but is required to corroborate by some additional evidence the falsity of the statement charged.⁴⁷ The government also bears the burden of proving the defendant's lack of belief in the false statement.⁴⁸ Nevertheless, by refusing to acknowledge the defense of recantation,⁴⁹ the General Perjury Statute discourages testimonial corrections whenever the witness believes that the correction would corroborate other evidence of the falsity of the former testimony, thereby satisfying the two-witness rule.

The False Declaration Statute reverses this approach: under subsection (c) certain forms of inconsistent testimony constitute conclusive evidence of falsehood, while under subsection (d) other forms of inconsistent testimony will give the witness a defense of recantation. The False Declaration Statute thus makes testimonial revision less risky, but only if it can be characterized as recantation. Otherwise, it is more risky because of the reduced pleading and proof requirements of subsection (c).

In order to analyze the combined behavioral effects of these statutes, it is necessary to look more closely at the basis for the radically different treatment accorded recantation and other inconsistent statements under the False Declaration Statute. The following analysis suggests that these two categories of testimony are, for most practical purposes, equivalent. They are treated differently not because they are of different values to the judicial system but because they symbolize the

46. 18 U.S.C. § 1623(c) (1982).

47. See *supra* note 23.

48. See *supra* note 18.

49. See *supra* note 43.

two sides of the unresolved conflict between the deterrence and mitigation policies of the statute.

1. The Inconsistent Statement Provision

By permitting the government, in effect, to plead and prove false declaration in the alternative when the defendant has testified inconsistently, the inconsistent statement provision⁵⁰ prevents a defendant who obviously lied on one of two occasions from avoiding prosecution because the trier of fact cannot determine upon which occasion he lied. The provision rests on the tautology that when a witness utters "two or more declarations, which are inconsistent to the degree that one of them is necessarily false [sic],"⁵¹ the witness has uttered a false declaration. While the requisite degree of inconsistency alone might permit an inference that one of the statements was false, however, it does not establish that the falsity was intentional.⁵² The inference of intent will depend

50. (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

- (1) each declaration was material to the point in question, and
- (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilable contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration to be true.

18 U.S.C. § 1623(c) (1982).

Compare the inconsistent statement provision of the Model Penal Code:

Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such a case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

MODEL PENAL CODE § 241.1(5) (1980).

51. 18 U.S.C. § 1623(c) (1982). One presumes that the adverb "necessarily" modifies "is" rather than "false." Only self-contradictory statements are necessarily false.

52. It should be noted that the standard of inconsistency set forth in the statute is not as self-evident or easy to apply as one might imagine. Consider:

1. No two non-contemporaneous statements purporting to describe a witness's recollection of an event can ever meet the statutory requirement that one of them was necessarily false when made. Regardless of the form that factual testimony takes, it can only describe the witness's contemporaneous recollection. An exception might be statements of contemporaneous perception. But no two of these could be contradictory because they would describe perceptions at different times. "The light was red" is understood to mean "My present recollection is that the light was red," although the latter expression conventionally suggests that the recollection is weak. Indeed, a witness's attempt to testify to anything other than his recollection of his perceptions would ordinarily be inadmissible as either opinion or speculation. *Cf.* FED. R. EVID. 602 (requirement that testimony be based on witness's personal knowledge); 701 (lay opinions inadmissible unless based on perception). Because statements of past facts describe only the witness's current recollection, non-contemporaneous factual statements made by the same witness about the same event actually describe different mental states. Thus, no two statements

instead upon such factors as the nature of the matter testified to, the

about a witness's recollection can ever come into direct conflict. See *United States v. Flowers*, 813 F.2d 1320 (4th Cir. 1987), in which the court held that two contradictory statements concerning an event were not inconsistent within the meaning of the statute when the witness also testified that his memory of the event had changed.

Such a strict reading of "necessarily false" in the inconsistent statement provision would render it nugatory. In order to avoid the problem of under-inclusiveness that this argument creates, one might argue that the statute refers only to inconsistency between the statements of matter recollected. This reading, however, quickly leads to problems of over-inclusiveness because it conflicts with the central idea that witnesses are asked about and testify to their recollection of events rather than to the events themselves. It strains credulity to believe that subsection (c) is to come into play whenever a witness's recollection changes.

The Model Penal Code seeks to avoid this problem by using the idea of rational incompatibility. MODEL PENAL CODE COMMENT 241.1(8) (1980):

Finally, it should be noted that the word 'inconsistent' is preferable to 'contradictory' in the statutory formulation, since statements may be rationally incompatible without literal contradiction. It is, according to the definition of 'statement' in Section 241.0(2), the total impact of the 'representation' made by the defendant that is to be considered in a perjury prosecution. Inconsistent representations need not literally contradict one another in order for the total picture conveyed by the witness to be quite different from one occasion to another.

The total picture test, however, does not meet the statutory standard that requires one of the statements to have been "necessarily" false. Although this test would overcome the problem of the under-inclusiveness of logical inconsistency, it would create the opposite problem of overbreadth by loosening the definition far too much. The "total picture" of a witness's testimony can change dramatically when facts are added or different language is used, without any false statements being uttered. Moreover, because reasonable minds can often differ about whether two statements are rationally inconsistent, such statements would not be "necessarily" inconsistent as required by the federal statute.

The possibility of rapid memory loss would never seem to be "necessarily" excluded, as the statute seems to require. This problem of under-inclusiveness can be avoided only by expanding the notion of "necessarily false" to include weaker forms of inconsistency, which would risk removing the certitude that the statutory standard provides.

2. Consistency or inconsistency may not be self-evident from the statements themselves but may instead depend upon facts unexpressed in the statements but assumed to be true, for example, "Mr. Bush attended the meeting" and "The President did not attend the meeting." These statements are inconsistent because of the unexpressed fact that Mr. Bush is the President. Such essential unexpressed facts may not, however, always be so clear or undisputed. If the unexpressed facts were uttered by the defendant under oath, they should be included in the indictment: the provision refers to two or more inconsistent statements, apparently covering the situation in which no two of the defendant's statements are inconsistent without taking into account additional statements. For instance, "The President attended the briefing," "The President did not know of the plan," "The plan was disclosed at the meeting," and "The President knew of all plans disclosed at the meeting." No two of these statements contradict each other, but one statement of the four must be false.

The statute's failure to specify whether and to what extent extraneous information can be taken into account in determining the degree of inconsistency the statements contain is much more troublesome when the extraneous evidence does not come from statements made by the defendant and the defendant does not admit the truth of the extraneous evidence necessary to such a determination. Because it acts as a substitute proof of falsity, which the government would otherwise be required to establish to the jury, the inconsistent statement provision should not apply to statements whose inconsistency depends upon the acceptance of extraneous evidence whose truth is open to rational question.

3. The inconsistent statement provision does not clearly define where one statement leaves off and the next begins. This failure leads to ambiguity when a witness's testimony might be characterized as either a single self-contradictory or incoherent statement or as two inconsistent statements. The statute does not refer to the time between the inconsistent statements, making it possible that it either reaches corrections made in the same breath or does not reach corrections made days later.

The Model Penal Code's solution to this problem is to define "statement" to include

specificity of the testimony, the witness's certainty and demeanor on the stand, the passage of time between the statements, the narrative context of the statements, the clarity of the questioning, the surrounding facts assumed by the trier to be true, and the defendant's explanation, if any, for the inconsistency. Thus, proof of inconsistent statements *per se* does not establish the *mens rea* element of the false declaration statute. Yet, to an extent not yet made wholly clear by judicial construction, the inconsistent statement provision permits proof of inconsistency to replace proof of knowingly false declaration.

Because the degree of inconsistency, logical or rational, is the same for innocent as well as perjurious inconsistencies, the only way to rescue innocent revisions from the operation of the statute is to require the prosecution to prove that the false statement in a pair of inconsistent statements was knowingly false when made. Two statutory provisions bear on the question. Subsection (a) in defining false declaration refers to one who "knowingly makes any false material declaration."⁵³ This provision requires the government to prove that the defendant knew of the falsity of the statement.⁵⁴

But the inconsistent statement provision permits the burden of production of evidence on this element of the offense to be shifted to the defendant once inconsistent statements are proved. That provision refers to one who "has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false." The sentence is ambiguous in that this "knowingly" might refer to the making of the statements, the logical inconsistency between the statements, or the actual falsity of one of the statements. Subsection (a) implies that "knowingly" in subsection (c) refers to the actual falsity of one of the statements, thus requiring the prosecution to prove knowledge in addition to inconsistency. If "knowingly" in subsection (c) refers only to the making of the statements or the fact of their inconsistency, then subsection (a)'s *mens rea* requirement would be evaded.

Yet, one court has indeed held that "knowingly" in subsection (c) refers only to the making of the statements. In *United States v. Stassi*,⁵⁵ the defendant was convicted of having made inconsistent sworn statements in a guilty plea proceeding and in an affidavit on a motion to vacate the plea. The court rejected the defendant's argument that the government had not proved that his statements were knowingly false,

the total impression left by the witness's testimony. "[S]tatement means any representation" MODEL PENAL CODE § 241.0(2). A representation is:

[T]he total impression conveyed by a sequence of declarations by the accused rather than the literal content of a single sentence taken from the sequence

Thus, even though a single declaration in the course of a series of questions was false, the 'representation' for purposes of perjury would be the total impression conveyed by the answers as a whole.

MODEL PENAL CODE § 241.1 Comment b.

53. 18 U.S.C. § 1623(a) (1982).

54. See *United States v. Crippen*, 570 F.2d 535 (5th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

55. 443 F. Supp 661 (1977).

stating: "[T]he *mens rea* element of 'knowingly' does not apply to whether the statements were false but rather to how they were made. . . . The requirement dictates that only knowing, intentional or voluntary (as opposed to inadvertent or accidental) statements be the subject of prosecution."⁵⁶ The court held that, unless a defendant adequately raises the affirmative defense of belief in the truth of the statements, the government need not prove that they were made with knowledge of their falsity.⁵⁷ *Stassi* holds that proof of inconsistent statements alone discharges the government's *prima facie* burden of proof of the element of intent.⁵⁸ This holding implies that the defendant is not even entitled to an instruction on the defense of belief in the truth of the statements unless he adduces some evidence of that intent.

The result of *Stassi* is that, upon the government's proof that the defendant made sworn inconsistent statements, the burden of producing evidence bearing on knowledge of falsity shifts to the defendant.⁵⁹ Although knowledge of falsity is an element of the offense of false declaration, *Stassi* requires the prosecution to prove knowledge only if the defendant adequately raises the defense that he believed in the truth of each statement when it was made.⁶⁰ Shifting the burden of producing evidence to the defendant as to an element of the crime before the government has proved that element is of doubtful constitutionality.

While a statute's allocation of the burdens of proof and production of evidence offends a defendant's fifth amendment due process right if it has the effect of relieving the government of proving one of the elements of the crime charged,⁶¹ the Court has not determined whether or

56. *Id.*

57. *Id.* at 667.

58. *Id.*

59. In addition to knowledge and materiality, the government must show falsity. Defendant argues convincingly that the government has not proved beyond a reasonable doubt that the defendant knew that the June 22, 1976 affidavit was false when it was signed and sworn to. The court agrees. Indeed, the government's burden in this situation is greater than even the defendant suggests. Once a defendant raises the affirmative defense of his belief in the truth of a statement, the burden is on the government to disprove this belief beyond a reasonable doubt. [citation omitted] However, success on this issue does not serve to exonerate the defendant from the charges against him. Under § 1623(c), the government may prove that one of the statements was necessarily false merely by introducing two irreconcilably contradictory declarations to the point in question. [citation omitted] *The defendant in the two-statement situation must then demonstrate or at least raise the issue that he believed each declaration to have been true at the time it was made.* [citation omitted] While the defendant has sufficiently demonstrated his belief in the veracity of the June 22, 1976 statement, he has not presented any evidence toward his belief that the June 2, 1975 declarations were true when they were made. *Indeed the argument defendant puts forward which tends to show his belief in the veracity of the latter statement also demonstrates the defendant's belief in the falsity of the former declarations.*

Stassi, 443 F. Supp. at 666-67 (emphasis added). This suggests that, to be entitled to an instruction on the belief defense, the defendant must meet the burden of production of evidence on the issue.

60. *Id.*

61. The fifth amendment due process clause, U.S. CONST. Amend. V, requires that the government prove each element of the offense charged beyond a reasonable doubt. In *re Winship*, 397 U.S. 358, 364 (1970) (the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to consti-

in what circumstances shifting the burden of production of evidence bearing on an element of a crime might violate due process.⁶² Such a presumption might well be held violative of due process because, while it operates, it has the prohibited effect of relieving the government of

tute the crime with which he is charged." [emphasis added]). *See also* *Morissette v. United States*, 342 U.S. 246 (1952):

[T]he trial court may not withdraw or prejudice the issue by instruction that the law raises a presumption of intent from an act A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudice a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. [footnote omitted]. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.

Morissette, 342 U.S. at 274-75.

Evidentiary presumptions that have the effect of relieving the prosecution of this burden have been held to violate due process. *See also* *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975) (State may not redefine elements of crime as punishment factors thereby relieving the prosecution of the burden of proving them) *Cf.* *Patterson v. New York*, 432 U.S. 197 (1977) (conviction of second degree murder does not violate due process by placing burden on defendant to prove affirmative defense where defense does not negative any fact essential to conviction of crime, although there are limits beyond which the state cannot go in reallocating burdens of proof by labeling elements of the crime as affirmative defenses.)

In conducting this analysis, the Court has distinguished between mandatory and permissive presumptions. A mandatory presumption may be either conclusive or rebuttable. A conclusive mandatory presumption "removes the presumed element from the case once the State has proven the predicate facts giving rise to the presumption." *Francis v. Franklin*, 471 U.S. at 314 n.2. A conclusive mandatory presumption as to an element of the crime is unconstitutional. *Sandstrom v. Montana*, 442 U.S. at 517. A rebuttable mandatory presumption requires the jury to find the presumed element upon proof of the predicate facts unless the defendant persuades the jury otherwise. *Francis* at 314. Such a presumption is also unconstitutional.

Stassi denies that the statute creates a mandatory presumption by affirming that the prosecution must prove knowledge of falsity. "Once a defendant raises the affirmative defense of his belief in the truth of a statement, the burden is on the government to disprove this belief beyond a reasonable doubt." *Stassi*, 443 F. Supp. at 666-67.

A permissive presumption permits, but does not require, the trier of fact to infer an element of the offense from proof of some other fact. Such presumptions are constitutional so long as there is a rational connection between the element inferred and the fact proved. *Francis* at 314-15; *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979).

62. A mandatory presumption may shift the burden of production by requiring that the jury find the presumed fact unless the defendant produces some evidence of its non-existence, and only thereafter putting the burden of proof of the element on the prosecution. The Court has not determined under what circumstances such a presumption shifting the burden of production to the defendant would be unconstitutional. *Francis v. Franklin*, 471 U.S. at 314 n.3; *Patterson v. New York*, 432 U.S. at 230 (Powell, J., dissenting); *see also* WIGMORE, EVIDENCE § 2487, 2512.

Characterizing the element as a defense on which the defendant has the burden of proof has been held to be unconstitutional when the element is a natural element of the crime charged, as has characterizing the element as a factor to be considered upon sentencing. *See Mullaney v. Wilbur*, *supra* note 62. The defendant's belief in the truth of the statement is nothing more than the negative of the element of knowledge of the falsity of the statement. The False Declaration Statute cannot, under the guise of establishing an element of the affirmative defense of belief, constitutionally compel the defendant to shoulder the burden of negating the element of knowledge of falsity.

the burden of proving an element of the offense.⁶³ Moreover, under *Stassi*, in order to discharge the burden of production, the defendant must introduce some evidence of his belief in the truth of both of his statements.⁶⁴ This almost certainly requires the defendant to take the stand, waiving his fifth amendment privilege against self-incrimination.

Regardless of the constitutionality of the statute under the *Stassi* rule, there is no doubt that a witness will face a difficult task in attempting to invoke the defense of belief in the truth of the inconsistent statements. This chilling effect applies to innocent witnesses contemplating testimonial corrections as well as to potential perjurers. The witness must produce some evidence that he believes both statements to have been true when made. Any evidence tending to show that the witness believed one of the statements tends to make it less likely that he believed the other one.⁶⁵ The witness will usually have no objective evidence of his belief; his personal credibility will be determinative of the issue.

Congress expressly denied that the inconsistent statement provision relieves the government of the burden of proving intent to falsify.⁶⁶ *Stassi's* may have read the provision differently because the court could not understand how the government could discharge such a burden when, as is likely, one of the inconsistent statements was true when made. It is impossible for the government to prove a defendant's knowledge of falsity of a true statement. The government might, however, prove with respect to each statement that *if* it was false, then the defendant knew that it was false when he made it.

It is suggested that the proper reading of the statute is that the defendant may be convicted of false declaration upon proof beyond a reasonable doubt: (1) that he made sworn statements [otherwise qualifying] that were so inconsistent that one of them must have been false when made and, (2) that whichever one was false, the defendant must have known it to have been false when made. This formulation would

63. *But see Mullaney*, 421 U.S. at 703 n.31 (suggesting that shifting the burden of production to the defendant may be subject to less stringent due process requirements than shifting the burden of persuasion); *Patterson*, 432 U.S. at 231 in which Justice Powell opines that shifting the burden of production may be permissible on such issues as malice, citing MODEL PENAL CODE § 1.13, comment, p. 110 (Tent. Draft No. 4, 1955). The Official Draft of the Model Penal Code, however, seems to limit permissible shifts in the burden of production to affirmative defenses, not elements of the crime. MODEL PENAL CODE § 1.12(1) & (3).

64. *Stassi*, 443 F. Supp at 666-67. It is possible that a burden of production could be met by evidence put in by the prosecution or by inferences from other evidence put in by the defendant. *See supra* note 63. However, *Stassi* implies that discharging this burden would require evidence of more than the inference that any witness under oath believed that what he said was true.

65. *Id.*

66. Under present law, even if a witness makes two statements which are so patently contradictory that one or the other must be false, the prosecution must nevertheless prove which of the statements is false and then prove an intentional falsehood. In accord with the commission recommendation, the committee rightfully retained the requirement that an intent to falsify be shown. However, if one of two statements logically must be false, then title IV recognized that fact. 116 CONG. REC. 589 (1970).

permit alternative pleading and proof without changing the government's affirmative burden of proof and production as to any of the elements of the offense.

If this reading is correct, however, then the statutory defense that the defendant believed each statement to have been true when made is superfluous because it simply denies one of the elements of the crime that the prosecution must prove anyway. The defendant cannot prove that he believed to be true what the government proves that he knew to be false.⁶⁷ If the government fails to meet the burden of proving that the defendant must have known of the falsity of the false statement when he made it, the defendant should be acquitted.

2. The Statutory Treatment of Recantation

The recantation provision permits the witness to bar prosecution for a false declaration by making a timely admission that the declaration was false. In contrast to subsection (c)'s disincentives for inconsistent statements, the recantation provision is supposed to serve as "an incentive to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution by doing so."⁶⁸

Two problems attend the recantation defense: its inconsistency with the inconsistent statement provision and the judicial and statutory barriers that have frustrated its achievement of its legislative purpose.

(a) *Recantation versus Inconsistent Statement*

The sharp contrast between the statute's treatment of "inconsistent statements" and "recantations" requires courts to differentiate between the two. But such a distinction is difficult to draw. A recantation obviously denies the truth of the statement recanted. Since any recantation is inconsistent with the statement recanted, every recantation and the statement it recants satisfy subsection (c)'s definition of inconsistent statements: either the recantation or the statement recanted must necessarily be false. Conversely, every statement admits, at least implicitly, the falsity of any contradictory statement previously made; the latter of any two inconsistent statements thus implicitly recants the former. In substance, all recantations are inconsistent statements, and vice versa.

The statute does not permit both subsections to be applied to the same pair of statements made in the same proceeding.⁶⁹ If recantations

67. See MODEL PENAL CODE § 241.1 Comment 3 (1980).

68. 2 U.S. CODE CONG. & ADMIN. NEWS 4024 (1970).

69. Subsection (c) will not conflict with subsection (d) unless both provisions could apply to the same statement. Since a recantation must occur within the same continuous proceeding and must be timely, for example, only subsection (c) can apply to inconsistent statements made in different proceedings or result from recantation which is untimely.

On the other side, it might be possible to recant without uttering an inconsistent statement. Subsection (c) requires that the inconsistent statements be made under oath, but this is not expressly required by subsection (d) for recantations. Thus, an unsworn recantation would not constitute an inconsistent statement. See *United States v. Crandall*,

were inconsistent statements, then they would not bar prosecution. If inconsistent statements were recantations, then they could not be prosecuted. Courts must therefore endeavor to distinguish the admission required by the recantation provision from a simple inconsistent statement. Federal courts have had numerous occasions to struggle with this problem in cases where defendants charged with having made inconsistent statements sought to characterize them as recantations.

Whether or not a statement constitutes a recantation, i.e. an admission of the falsity of a previous statement, has been held to be a question of law as to which the defendant has no right to a jury trial.⁷⁰ In determining whether a statement constitutes a recantation, courts have construed with uncommon strictness the requirement that the defendant admit the falsity of the statement recanted. Although the statute does not so provide, decisions have held that the recantation must be an explicit, unequivocal admission that the prior testimony was false.⁷¹ The requirement that the witness admit the falsity of the prior statement in order to recant effectively has been construed to mean that an attempt at recantation that explained the earlier statement as a mistake or an innocent error is not effective.⁷²

These holdings mean that a witness who retracts an earlier inconsistent statement and truthfully explains it as a mistake will not fulfill the requirements of the recantation defense. Such a witness could recant effectively only if she were to [falsely] admit that the earlier statement

363 F. Supp 648 (W.D. Pa. 1973), *aff'd*, 493 F.2d 1401, *aff'd*, 495 F.2d 1369 (3d Cir.), *cert. denied*, 419 U.S. 852 (1974) (statement given to a prosecutor while the grand jury was in recess held adequate as a recantation because the statement was read to the grand jury when it reconvened, but held not to constitute an effective recantation on other grounds); and *United States v. D'Auria*, 672 F.2d at 1091. *But see United States v. Goguen*, 723 F.2d 1012, 1017 n.5 (1st Cir. 1983) (suggesting that the statement must be made directly to the grand jury). These decisions suggest that a witness may recant grand jury testimony by letter or other out-of-court statements to the prosecutor.

70. *Goguen*, 723 F.2d 1012 (1st Cir. 1983); *D'Auria*, 672 F.2d 1085 (2d Cir. 1982). Recantation has been held to be a jurisdictional bar to prosecution that must be raised in a motion under FED. R. CRIM. P. 12(b)(2). *United States v. Parr*, 516 F.2d 458, 472 (5th Cir. 1975); *Denison*, 663 F.2d at 618.

71. *United States v. Brown*, No. 84-5546 (D.C. Cir. March 24, 1986) (unpublished slip opinion available in LEXIS) (although defendant's answers were sufficiently inconsistent to satisfy subsection (c), the latter answer did not amount to an admission of falsity of the former); *Goguen*, 723 F.2d at 1018 ("[F]or an effective recantation the accused must come forward and explain unambiguously and specifically which of his answers in prior testimony were false and in what respects they were false."); *D'Auria*, 672 F.2d at 1092 (witness must make an "outright retraction and repudiation").

In *D'Auria* the court affirmed the conviction of a grand jury witness whose counsel had unsuccessfully requested permission for the witness to return to the grand jury to "add to and clarify" his grand jury testimony, stating that he had not "completely understood" some of the questions and wished to "come forward with any additional information he could provide." The court held that this was too equivocal to constitute an adequate offer to recant. The court read the statute as requiring that not only the recantation, but also the offer to recant, must admit the falsity of the declaration in question.

72. *See* cases and discussion in note 70. Technically the original statement in such cases was not a false declaration. Apparently for this reason, these decisions imply that a witness may not bar prosecution for making a non-perjurious false statement. If the original statement was intentionally false then subsequent testimony that it was an innocent error is itself a false declaration.

was intentionally false. Despite the legislative intent, the statute thus provides no safe harbor for the honest witness seeking to rectify an innocent error.

The decisions announcing such an interpretation arguably distort the statutory language. The recantation provision requires only that the defendant admit the falsity of the prior testimony, not that she embellish the admission with further affirmative representations explaining how she came to testify falsely. If the defendant offers such an explanation, and it is false, then she may indeed have committed a second false declaration, but that subsequent falsehood cannot change the legal effect of her admission of falsity. The simple acknowledgment that the prior statement was false will remedy any damaging effect it would have had on the proceeding and should be sufficient for the defense of recantation.⁷³

Thus far, case law has tried to keep the statute from coming un-hinged by holding that a recantation avoids being an inconsistent statement only by making an express allusion to the prior declaration.⁷⁴ For example, if the witness first testified that "The light was red," and later testified "My statement that the light was red was false" she would have recanted, whereas if she later testified simply that "The light was not red" she would have uttered inconsistent statements and committed false declaration.⁷⁵ Thus, the court in *United States v. Brown*⁷⁶ held that a statement that was sufficiently specific to constitute an inconsistent statement contradicting former testimony did not constitute recantation of that testimony because the witness did not also state that the former testimony was false.⁷⁷

It is overwhelmingly likely that witnesses who have testified inconsistently with former testimony would, if asked, also readily admit that the prior testimony was false. Few people will knowingly maintain positions that are so inconsistent that one of them is necessarily false. A witness's failure to make an explicit statement that prior inconsistent statements are false is a failure of form, not substance, and results from the examiner's failure to draw the prior statement to the witness's attention. Thus, the classification of statements as inconsistent statements instead of as recantations depends on the fortuity of the questions asked rather than the answers given.

Such hyperformalism is to be expected when courts are required to discriminate between functionally similar phenomena. Both inconsistent statements and recantations inform the trier of fact that prior testi-

73. A second serious consequence of this interpretation of the statute is that a witness must in effect admit guilt under the General Perjury Statute in order to bar prosecution under the False Declaration Statute.

74. *United States v. Brown*, No. 84-5546 (unpublished slip opinion).

75. Note that an inconsistent statement can give the trier more information than the formal recantation. Compare: (1) "My statement that the light was red was false"; with (2) "The light was green."

76. No. 84-5546 (unpublished slip opinion).

77. *Id.*

mony was false. Both recantations and inconsistent statements may be either truthful attempts to correct the record or false attempts to deny prior truthful testimony. Both inconsistent statements and recantations leave the trier of fact to figure out which version of the events was true and which was false. Both inconsistent statements and recantations may be motivated by similar fears of exposure or similar desires to correct innocent errors. Yet, because the statute attaches radically different consequences to each, courts are driven to "find" differences between them, implementing an inconsistent policy toward testimonial inconsistency.

The "difference" between the two forms of testimonial inconsistency is symbolic rather than functional and is rooted in the need of perjury law to mediate between the values of deterrence and mitigation. Courts seem to see the difference between inconsistent statements and recantation as similar to the difference between bragging about one's sin and confessing it, a difference in the witness's attitude rather than the substance of the witness's communication. Such courts will sacrifice the mitigative benefits of testimonial correction to achieve the punitive effect of contrition.

The Model Penal Code addresses the similarity of inconsistent statements and retraction in applying its inconsistent statement provision.⁷⁸ The Code seeks to rescue testimonial corrections from classification as inconsistent statements provision by defining the term "statement"⁷⁹ to be equivalent to the term "representation." This latter term is defined as "the total impression conveyed by a sequence of declarations" and "the total impression conveyed by the answers as a whole."⁸⁰ The Code Commentary opines that a witness who changes his testimony in response to a single line of questioning will not be subject to prosecution for inconsistent statements: either he will be deemed to have made only one statement or he will be deemed to have recanted.⁸¹ While superior to the federal scheme, this approach must

78. The Model Penal Code provides:

Inconsistent Statements. Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant.

MODEL PENAL CODE § 241.1.

79. "[S]tatement means any representation, but includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation." MODEL PENAL CODE, § 241.0(2).

80. Comment to the MODEL PENAL CODE, § 241.1.

81. It is not intended, of course, that a defendant who changes his story in response to a single line of questioning thereby will subject himself automatically to prosecution under Subsection (5) . . . [E]ither the definition of "statement" or the retraction defense should come into play to prevent such a prosecution. Indeed, it might be suggested that in order for Subsection (5) to become operative, the declarant's inconsistent statements should either have been given on different occasions or at least pursuant to distinct lines of questioning.

solve the problem of determining where an "occasion" or "line of questioning" ends. Does it end when the interrogator changes topics, when the examination ends, when the cross-examination ends, or when the witness leaves the stand? The proposed solution in Part IV avoids this problem by referring solely to the proceeding in which the statements occur.

(b) *Barriers to Recantation*

The conflicting policies of deterrence and mitigation are not only expressed in distinctions between "bad" inconsistent statements and "good" recantations. The conflict creates inconsistent attitudes toward the recantation defense itself, both in the statutory language and the courts. Congress limited the utility of the defense by erecting formal barriers to its invocation. In addition, most courts have tended to view the defense of recantation as an undeserved gift of grace to the perjurer rather than as a Congressional recognition of the judicial system's interest in obtaining evidence of even intentional misstatement before its tribunals act. As a result, the courts have dispensed the benefit of the defense with a grudging hand, rather than liberally to encourage correction of the record.

The statute requires that a recantation be timely in three ways: it must occur during the same continuous proceeding as the false declaration, it must occur before the false declaration has had a substantial effect on the proceeding, and it must occur before the exposure of the falsity of the declaration has become manifest. While the purpose of these requirements is to encourage rapid recantation, narrow judicial interpretation has severely limited the availability of this defense.

The statutory requirement that the falsehood not have a substantial effect on the proceeding demands an inquiry into whether, as a factual matter, the falsehood has caused the tribunal to take or omit some action in reliance upon the falsehood.⁸² In the absence of proof that the falsehood affected the tribunal's process, the defendant presumably should be encouraged to correct prior testimony. Otherwise, avoidable injury to the judicial process could occur.

Decisions construing this provision, however, have precluded inquiry into causation. In *United States v. Tucker*⁸³ the court held that a witness's false denial of criminal activity had substantially affected a grand jury proceeding by causing the prosecution to grant immunity to another witness in order to obtain the testimony it desired. The defendant argued that, because the grant of immunity was unnecessary, the grant was not caused by the perjury. The court rejected this argument,

MODEL PENAL CODE § 241.1 Comment 8, n.108.

82. New York precedent before and after enactment of the federal statute provides no guidance as to the meaning of "substantially affect." Cf. *People v. Ezaugi*, 2 N.Y.2d 439, 440, 141 N.E.2d 580, 581, 161 N.Y.S.2d 75, 76 (1957) (suggesting that the deliberative or investigative body must have been misled or deceived by the lie, and that the deception harmed or prejudiced the deliberation or investigation—these are issues of fact).

83. 495 F. Supp 607 (E.D.N.Y. 1980).

holding that the statute does not require a detailed inquiry into the thought processes of grand jurors or into the exercise of prosecutorial discretion.⁸⁴

In *United States v. Krogh*,⁸⁵ the court denied a motion to dismiss a prosecution for false declaration made before a grand jury. The defendant argued that an affidavit he had given to the prosecutor recanted the falsehood. The court rejected the defense, finding that the grand jury had acted before the recantation, although the opinion discloses no effect that the false testimony might have had on that action. The court held that false statements are presumed as a matter of law to have been considered by the grand jury and to have substantially affected the proceedings whenever the grand jury has acted following the false testimony.⁸⁶

These holdings establishing a conclusive presumption that testimony has had an effect on the proceeding ignore the language of the statute. If Congress had intended to establish a presumption that any action subsequently taken by the tribunal was substantially affected by the false declaration, it surely could have so provided in the statute instead of using language that stimulates a factual inquiry into proximate cause. The restrictive reading of the statute instead reflects judicial hostility toward the defense of recantation, a hostility that rejects the relatively novel principle of mitigation for the time-honored principle of deterrence.

The recantation must also occur before "it has become manifest that such falsity has been or will be exposed."⁸⁷ Decisions interpret this language to mean that it is too late to recant if it has become manifest to the witness that the falsity has been or will be exposed to the tribunal or the government.⁸⁸

This rule leads to disqualification in many cases in which the incentive to recant arose from the witness's fear of exposure. The reason for this rule is unclear. Rejection of recantation in such cases might be based on one of three notions: (1) the information contained in the recantation is of no value to the tribunal; (2) the witness who recants only when facing exposure does not deserve a defense; or (3) to permit such recantations will encourage perjury because the witness will always have an "out" if the perjury is exposed.

The first justification is questionable. Even where the tribunal has

84. *Id.* at 614. This decision seems to hold that the required substantial affect can be found not only in actions of the tribunal, but also in actions of a litigant, i.e. the prosecutor. No warrant for this conclusion was given.

85. 366 F. Supp. 1255 (D.D.C. 1973).

86. *Id.* at 1256. See also *United States v. Crandall*, 363 F. Supp. 648, 654-55 (W.D. Pa. 1973), *cert. denied*, 419 U.S. 852 (1974) (delay of two months in recanting substantially affected grand jury proceeding by depriving it of evidence for that period of time, even though the grand jury was aware of the falsehood before the recantation).

87. 18 U.S.C. § 1623(d) (1982).

88. *United States v. Denison*, 663 F.2d 611, 615 (5th Cir. 1981); *United States v. Scrimgeour*, 636 F.2d 1019 (5th Cir.), *cert. denied*, 454 U.S. 878 (1981); *United States v. Moore*, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

heard another witness directly contradict the defendant's prior testimony, the tribunal may be uncertain about which account was accurate. The defendant's recantation would often permit the tribunal to achieve a more certain resolution of the contradiction. Such useful recantations are discouraged by the statutory restriction, to no apparent purpose.

Rejecting such recantations for moral reasons also seems to frustrate the statutory policy of enhancing testimonial reliability.⁸⁹ There is little to choose between the morality of a witness who tells the truth initially because of fear of exposure and the morality of a witness who recants later because of a fear of exposure.

The third possible justification has received the most support in judicial opinions.⁹⁰ Courts fear that if the exposure requirement were abandoned, perjurers will lie with impunity, secure in the knowledge that if the lie is exposed, they can admit it and avoid prosecution. This fear seems exaggerated, as discussed in Part IV, below.⁹¹

In addition to the constraints placed upon recantation by Congress, the courts too have displayed a reluctance to adopt the policy justifications of the recantation provision when construing the statute in areas in which it is silent.⁹² For example, they have held that the government has no duty to warn a witness that he may recant false statements, and that it has no duty to give a witness who it believes to have testified falsely an opportunity to recant.⁹³

Courts have also manifested a distrust of the behavioral effects of the incentives the recantation provision is thought to offer to witnesses.

89. Speaking of a similar requirement contained in New York law, one judge said: "[S]ince the recantation rule's purpose is not to reward or punish the liar but to get the truth into the record, the perjurer's motive for recanting has nothing to do with it at all." *People v. Ezaugi*, 2 N.Y.2d at 444-45, 141 N.E.2d at 583-84, 161 N.Y.S.2d at 79 (dissenting opinion). But see MODEL PENAL CODE § 5.01(4) and accompanying Comment (denying a withdrawal defense to the crime of attempt where the withdrawal resulted from probability of detection or other factors that made accomplishment of the criminal purpose more difficult).

90. See *infra*, text accompanying notes 95-97.

91. The situations that give rise to disqualification because of exposure should be noted. Courts have held that recantation comes too late if it comes after the prosecutor warns the defendant that he may be charged with perjury. Thus, a prosecutor may apparently cut off any possibility of recantation by confronting a suspected perjurer with his falsehood immediately after his testimony. See *United States v. Lardieri*, 506 F.2d at 324.

Exposure becomes manifest in other situations in which it would seem inappropriate to deny the recantation defense. For example, if the witness first makes an inconsistent statement, and then, when it is drawn to his attention, more explicitly recants his original declaration, the recantation might be deemed to be too late because exposure of falsity became manifest to the witness by reason of his inconsistent statement. Another possibility of a disqualifying "manifestation" is the disclosure to a witness by his counsel that the untruth will be revealed to the tribunal if the witness does not do so himself. See discussion below at Part III.

92. *Id.* See *Denison*, 663 F.2d at 617 ("Section 1623(d) balances the need to encourage a witness to correct his testimony against the need to prevent his perjury at the outset. We see no reason to disturb this balance by broadening the immunity accorded to a witness who recants . . ."). See also *United States v. Lardieri*, 506 F.2d at 324 (making a similar argument about whether grand jury witnesses must be given notice of their ability to recant).

93. *Id.*

In *United States v. Moore*,⁹⁴ the court construed the relationship between the two prerequisites to recantation, lack of effect on the tribunal and lack of exposure of the falsehood. The statute requires that the recantation must occur "before the false declaration has had a substantial effect on the proceeding, or before the exposure of the falsity of the declaration has become manifest."⁹⁵ Although the New York statute upon which the False Declaration Statute was modeled⁹⁶ expresses the prerequisites in the conjunctive, using the word "and," the False Declaration Statute expresses them in the disjunctive, using the word "or." In *Moore*, the defendant argued that his recantation was timely because, although disclosure of the falsehood had become manifest to him, the falsehood had not yet affected the proceeding.

The court refused to read the False Declaration Statute disjunctively, reasoning that to do so would frustrate Congressional intent. The court acknowledged the inconsistency between the deterrent and mitigation elements of the statute,⁹⁷ but reasoned that construing the recantation prerequisites in the disjunctive would weaken the deterrent effect of the statute and would disrupt the intended balance between these elements. This argument neatly begged the question by assuming what it set out to prove, i.e. exactly where Congress intended to place the balance point between deterrence and mitigation.

The court then speculated on the behavior that different constructions of the statute would induce in witnesses, reiterating a fear originally articulated in *United States v. Norris*⁹⁸ that the easy availability of a recantation defense would make perjury more attractive. The hypothetical witness would believe that perjury was risk free: if the lie was not discovered, he would not be prosecuted while if the lie was discovered, he could recant and would not be prosecuted. This reasoning led the *Norris* court to reject the retraction defense under the General Perjury Statute. The *Moore* court⁹⁹ likewise reasoned that the False Declaration Statute's deterrent effect would be nullified by giving perjurers the statutory right to recant after their lies were disclosed, but before the proceeding was substantially affected.

The court was here engaged in open warfare against the policy of the recantation provision. Citing *Norris* to explicate the recantation provision ignores the simple fact that the recantation provision was intended to change the law that *Norris* expounded. The *Moore* decision is more nearly an argument against the concept of a recantation defense than an attempt to construe it: the court simply rejects the statutory premise that recantation may induce more accurate testimony than inac-

94. 613 F.2d 1029 (1979).

95. 18 U.S.C. § 1623(d) (1982) (emphasis added).

96. See *infra* text accompanying note 44.

97. *United States v. Moore*, 613 F.2d at 1041.

98. 300 U.S. 564, 574 (1937).

99. *Moore*, 613 F.2d at 1041. This argument appears in *Scrimgeour*, 636 F.2d 1019 (5th Cir. 1981) and *Denison*, 663 F.2d 611 (5th Cir. 1981).

curate testimony.¹⁰⁰ The decision is, however, understandable because of the ambivalence toward recantation displayed in the statute itself.

In summary, the federal perjury statutes treat inconsistent testimony inconsistently, at times seizing on testimonial inconsistency as evidence of perjury and at others seeming to urge inconsistency that recognizes former testimony as false. What one might euphemistically describe as the resulting "tension" between the deterrence and mitigation policies of the statutes is, for federal witnesses and their counsel, an insoluble double bind.

III. CONFLICTING INCENTIVES CREATED BY THE FALSE DISTINCTIONS OF THE STATUTE

The probable effect of criminal and other instrumentalist statutes is usually analyzed by predicting the behavioral responses they are likely to engender, using assumptions about rationality and self-interest not unlike those used in economic analysis.¹⁰¹ Thus, for example, the decisions in *Moore* and *Norris* rely on a typical, instrumentalist thought experiment: How would a rational, self-interested witness who was aware of the statute and its judicial construction take it into account in deciding whether or not to commit perjury? One should be exceptionally wary of such exercises when applied to perjury, for which no reliable data exist to test the accuracy of the assumptions or the conclusions. In default of empiricism, however, rhetoric remains the only instrument for critique of criminal laws.

This section will use this approach to analyze the incentives and disincentives relating to inconsistent testimony created by the federal perjury statutes for federal witnesses and federal trial attorneys. It will also analyze the strategic benefits that the inconsistent statement provision gives to federal prosecutors. It will attempt both to predict the actions that the statutory sanctions will lead to and to weigh the desirability of those actions against the goals of the statute.

A. *Effects of the Perjury Statutes on Federal Witnesses*

The inconsistent statement and recantation provisions will have effects on three categories of witness: those who contemplate committing perjury for the first time in a proceeding; those who have committed

100. The *Moore* court's reading means that the defendant's attempts to prove the two prerequisites to the recantation defense would often tend to be mutually exclusive. A lie that has not been exposed is more likely to have substantially affected the proceeding. Conversely, one major reason that a lie may not have substantially affected the proceeding is that it has become manifest. In most cases, therefore, one of the two prerequisites would probably fail, making the defense unavailable.

101. See Summers, *Pragmatic Instrumentalist in Twentieth Century American Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981); R. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1; Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259, 261 (June 1972) (seeking to quantify deterrence).

perjury and contemplate correcting it; and those who have made unintentionally false statements and contemplate correcting them.

Even if the witness is one whose behavior would be influenced by a perjury statute,¹⁰² the inconsistent statement provision would have no deterrent effect on the decision to commit perjury in giving an initial testimonial account. It would, however, provide a strong disincentive to any witness whose original testimony was true and who is thinking of testifying falsely by contradicting that testimony. Even in the absence of the inconsistent statement provision, however, such a witness could be prosecuted under the False Declaration Statute for making the second statement. In such a prosecution, the original statement might be sufficient evidence of guilt. In addition, as discussed below in this subsection, by employing a number of well-known strategies, such witnesses can usually avoid repeating the original testimony in a different proceeding.

It is possible that a recantation provision could affect the initial decision to commit perjury, on the theory that recantation would be available if the lie failed. However, as seen above, such exposure disqualifies an attempted recantation, which makes the recantation provision of little importance to a witness contemplating perjury in giving an initial testimonial account of a matter.

For witnesses who have already testified inaccurately, the federal perjury statutes inhibit any change in testimony, regardless of the truthfulness of the change or its value to the tribunal. A summary of the provisions analyzed in the preceding section shows that a rational witness has no statutory incentive to correct prior testimony whether or not the prior testimony was intentionally false.

First consider the witness whose original testimony was innocently mistaken. Under the General Perjury Statute, although inconsistent testimony alone will not suffice for conviction, an attempt to correct earlier testimony may corroborate other evidence of the falsity of the earlier testimony and permit a prosecution that would have been otherwise un-maintainable. Because the *Norris* rule denies the witness the defense of recantation, a witness who corrects prior testimony faces *Norris's* fate.

For the same witness, under the False Declaration Statute, correction of prior testimony constitutes an inconsistent statement unless it is timely and in the correct form for a recantation. If it is held to be an

102. It is probable that a great deal of testimony is not actually affected by statutory sanctions. Several categories of potential perjurers will presumably commit perjury under any statutory regime. First, criminal defendants who perceive the benefit products risks of perjury to exceed its cost products will not be deterred. To the witness/defendant charged with a capital crime, if the the perjury is successful, it is rewarded, whereas if it fails, the incremental punishment is insignificant. Likewise, witnesses who are induced by intimidation to commit perjury will not be deterred if the threat of criminal sanctions is less certain or severe than the intimidator's threat. Witnesses who are confident that their lies will not be exposed, or that conclusive proof that they lied cannot be obtained, will not perceive the risk of conviction for perjury to be significant. Finally, of course, witnesses who do not reflect before committing perjury will not be affected by the statutory scheme in making the initial decision to lie.

inconsistent statement, the correction establishes a *prima facie* case of false declaration against the witness. The False Declaration Statute gives the innocently incorrect witness nothing to gain and everything to lose by correcting former testimony. Indeed, to the extent that the statute gives the innocent witness an incentive to testify in any particular way, it encourages the witness to testify consistently with former testimony even when that testimony was false.¹⁰³

The hoped-for counter-effect of the False Declaration Statute's recantation provision has been frustrated by statutory limitations and severe judicial construction. The provision is as useless to witnesses whose original testimony was innocently mistaken as it is to those whose original testimony was intentionally false. A witness who truthfully states that his former testimony was innocently mistaken will not be held to have recanted.¹⁰⁴ The statute offers no opportunity for such a witness to correct the record without risk of prosecution.

As for the witness whose original testimony was perjurious, the recantation provision is of uncertain application because of the timeliness requirements. An attempt to recant that fails because of one of these requirements will destroy the witness's ability to defend against a charge of false declaration because the attempted recantation provides compelling evidence of both the falsity of prior testimony and the defendant's knowledge of the truth.¹⁰⁵

But even a timely recantation is no bargain to the perjurer. Although recantation is a defense to a charge of false declaration, a witness remains susceptible to prosecution under the General Perjury Statute for making the recanted statement. No reported decision¹⁰⁶ has yet ruled on a defense that prosecution was barred under the General Perjury Statute by reason of a recantation under the False Declaration Statute, but language in several decisions suggests that such a prosecution is possible.¹⁰⁷ Thus, a witness may be prosecuted under the General Per-

103. Although the federal statutes do not address the issue, decisions construing the General Perjury Statute have held that repetitions of a perjurious statement do not subject a witness to multiple counts of perjury. Thus, the risk of perjury is not increased appreciably by a witness's repetition of a prior incorrect statement while correction of it holds far more peril.

104. See discussion above at Part II-C-2.

105. Once rejected, the recantation issue may not be raised at trial and argued to the jury. The rule of [*United States v. Norris*] that recantation is no defense to perjury still holds sway when a defendant does not come within the recantation provisions of section 1623(d) and creates a bar to prosecution.

United States v. Denison, 663 F.2d at 618.

106. In *United States v. Kahn*, 472 F.2d 272, 283 (2d Cir. 1973), the court failed to reach this issue because it found the defendant, convicted under the General Perjury Statute, had failed to recant before the falsehood was exposed. However, it expressed discomfort with the idea that the government could prosecute under the General Perjury Statute if recantation successfully barred prosecution under the False Declaration Statute.

107. *Denison*, 663 F.2d at 616 n.6 (the recantation defense is available only to defendants charged under section 1623, not to those charged under section 1621.); *United States v. Swainson*, 548 F.2d 657, 663 (6th Cir. 1977), *cert. denied*, 431 U.S. 931 (dictum). In *United States v. Mitchell*, 397 F. Supp. 166 (D.D.C. 1974), *cert. denied*, 431 U.S. 933 (1977), defendants argued that the recantation provision was unconstitutional on grounds, among others, that the government could prosecute a recanting witness for perjury under 18

jury Statute for making a statement that he recanted.¹⁰⁸ It is likely that a recantation would corroborate falsity, in partial satisfaction of the two-witness rule, because of the rule that a recantation must unambiguously admit the falsity of the original statement and cannot attribute that inaccuracy to innocent error.¹⁰⁹ Thus, the perjured witness who is genuinely afraid of prosecution has absolutely no rational motive to recant.

The disincentives created by the federal perjury law's treatment of inconsistent testimony pose a threat to the process of cross-examination. The adversary trial examination, not prosecution for perjury, is the judicial system's chief institutional mechanism for assuring accurate testimony.¹¹⁰ The adversary system relies primarily on the skill of the trial attorney in marshalling evidence and cross-examining witnesses in order to expose and neutralize inaccurate testimony, of both the intentional and unintentional variety.¹¹¹

The inconsistent statement provision impedes the cross-examiner's ability to expose inaccurate testimony. Once a federal witness has given testimony, the federal statutes' command is not to tell the truth, the whole truth, and nothing but the truth. It is rather to tell the same thing, and nothing but the same thing, that the witness told before.¹¹² Cross-examination can grind to a halt when the risks associated with changes in testimony brook so large as to lead witnesses to assert their fifth amendment privilege against self-incrimination.¹¹³

U.S.C. § 1621. The court rejected this argument, holding that Congress could, consistent with due process, condition access to the protection of the recantation provision by requiring the defendant to increase his exposure to prosecution under the General Perjury Statute.

108. See *supra* note 107. The curious interplay between the General Perjury Statute and the recantation provision illustrates the effect of borrowing a statutory provision out of context. Both the New York Penal Code, the form on which the False Declaration Statute was modeled, and the Model Penal Code contain a recantation defense. In each case, recantation exonerates the witness from all criminal liability for the perjury. The False Declaration Statute, however, merely supplements the General Perjury Statute. The recantation defense thus has radically different implications in the federal scheme of law. Recantation under the False Declaration Statute exposes the witness to greater liability than exists under the General Perjury Statute.

109. Under the General Perjury Statute, admission that prior testimony was false can provide essential ammunition for the prosecution. The recantation may corroborate another witness's testimony as to falsity, thereby satisfying the two-witness rule. The recantation can also establish that the witness knew the truth at the time of the first statement, tending to prove that the original statement was intentionally false. Thus, the General Perjury Statute offers the strongest disincentives to correct inaccurate testimony.

110. See Best, *supra* note 13 (quote).

111. Wigmore celebrated cross-examination as:

[T]he greatest legal engine ever invented for the discovery of truth If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.

WIGMORE, EVIDENCE, *supra* note 13, at 1367.

112. Because of the "freezing effect," witnesses have been shown to become stubbornly committed to the first version of facts that they recount, even in the face of significant evidence to the contrary. E. LOFTUS & J. DOYLE, EYEWITNESS TESTIMONY 84-87 (1979). Thus, there is a bias against correcting previous testimonial accounts. Cf. *State v. Saporen*, 205 Minn. 358, 285 N.W. 898, 901 (1939). This bias is aggravated by threatening a witness who thinks of revising his testimony.

113. Witnesses often assert the fifth amendment privilege to avoid cross-examination

It is reasonable to assume that innocent error is considerably more common than perjury. The effect of discouraging correction in cases of innocent error would seem to exceed the marginal harm of any perjury inhibited by the inconsistent statement and recantation provisions as presently formulated. In addition, one must charge the inconsistent statement provision with the costs of perjury committed by witnesses who falsely affirm prior inaccurate testimony. For such witnesses, dishonest reaffirmation of the error keeps the testimony consistent and may be the less risky alternative.

B. *Effects on the Legal Profession*

The risks created by the federal perjury statutes create quandaries for lawyers advising federal witnesses. Both the American Bar Association Model Rules of Professional Responsibility (ABA Rules)¹¹⁴ and the American Bar Association Code of Professional Responsibility (ABA Code)¹¹⁵ require that an attorney who learns that false evidence has been presented to a tribunal must try to persuade the witness to correct the error and, failing that, must advise the court of the falsehood if the attorney can do so without revealing privileged matter.¹¹⁶ Disclosure

in criminal trials. See *United States v. Frank*, 520 F.2d 1287, 1292 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976) (striking the direct testimony of a government witness who invoked the fifth amendment when cross-examined by defendant's counsel). *Accord*, *United States v. Nunez*, 668 F.2d 1116, 1121 (10th Cir. 1981).

114. *Candor Toward the Tribunal*. (a) A lawyer shall not knowingly: . . . (2) fail to disclose a material fact to a tribunal when the disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; . . . (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6. [pertaining to client confidences].

MODEL RULES OF PROFESSIONAL CONDUCT 3.3 (1983). Comment 5 discusses the lawyer's duties when false evidence has been offered:

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If that persuasion is ineffective, the lawyer must take reasonable remedial measures.

See also Comments 4, 6, 11 and 12.

115. *Representing a Client within the Bounds of the Law*: (A) In his representation of a client, a lawyer shall not: . . . (4) Knowingly use perjured or false evidence . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent . . . (B) A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-102(A)(4), 7-102(B)(1) & (2) (1981).

116. The Model Rules require the attorney to take "reasonable remedial measures" if the persuasion is not effective:

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal

may result in the witness, perhaps the attorney's client, being prosecuted for perjury or false declaration.¹¹⁷

In the context of federal perjury statutes, the warning requirement creates a particularly acute dilemma for the witness's counsel. The warning makes the imminent exposure of the falsehood to the tribunal manifest to the witness. This exposure arguably renders the witness's recantation, if he chooses to give it, ineffective.¹¹⁸

The ABA Rules and the ABA Code harmonize poorly with the federal perjury statutes. A witness who changes his testimony incurs serious risks, yet, attorneys are instructed to urge witnesses to take precisely those risks. The attorney who urges a witness to correct a falsehood does so because of his professional responsibility as an officer of the court, not out of concern for the interests of the witness.¹¹⁹ The witness, who may have committed a crime, is urged to waive his constitutional privilege against self-incrimination and give what amounts to an in-court, sworn confession. It is disquieting to contemplate a court-

will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

MODEL RULES OF PROFESSIONAL CONDUCT 3.3, Comment 11 (1983).

117. Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 125 (1987). Cf. *Why Did Lee Testify in the Wang Case*, *The Wall Street Journal*, July 8, 1988 at 17, col.3 (recounting the story of an attorney who advised his client to recant, risking prosecution for the crimes about which the client had testified, in order to avoid perjury charges).

118. If an attorney's advice tainted the recantation, the statute would conflict with the policies of the rules regarding professional conduct. The warning given to the client would strip the client of a possible opportunity to avoid criminal liability. Yet, no obvious policy relevant to the False Declaration Statute would distinguish an attorney's threat of disclosure from a threat made by others, such as the prosecutor or a third party. The statutory policy seems to emphasize the morality of the witness's decision to recant, permitting the defense if the recantation is stimulated by a guilty conscience but denying a defense if the recantation results from fear of exposure. Courts have emphasized this distinction in applying the statute. See e.g. *United States v. D'Auria*, 672 F.2d 1085 (1981).

119. The witness's interests would require that he be advised to seek independent counsel before taking the stand and establishing a *prima facie* case of false declaration or perjury against himself.

enforced rule of professional conduct that requires an attorney to advise a person to waive a fundamental constitutional right.

These conflicts are not inevitable, but flow in large part from the statutory scheme now in place, a scheme that jeopardizes any witness who risks rectification of testimonial errors. A rule that would remove the risk of recantation would reduce the occasions for such troublesome professional dilemmas.¹²⁰

C. *Effects on the Prosecution of Organized Crime*

One might seek to justify the behavioral effects just described by arguing that the inconsistent statement provision has great utility to the government in criminal prosecutions. When Congress enacted the Federal False Declaration Statute¹²¹ as part of the Organized Crime Control Act of 1970,¹²² it heralded the statute as part of a new arsenal of weapons in the war against organized crime.¹²³ Witnesses are difficult to prosecute for perjury under the General Perjury Statute.¹²⁴ Elimination of the common law evidentiary restraints, including the inconsistent statement rule, was intended to make it easier for the government to obtain convictions for perjury, consequently deterring perjury and increasing convictions for the substantive offenses.¹²⁵

But does the inconsistent statement provision really alter the balance of power between the prosecution and the criminal defendant? In light of the abandonment of the two-witness rule, the inconsistent statement provision would seem to be of value only in the relatively rare circumstance in which the government cannot decide which of a witness's contradictory statements to charge as false. The provision has, however, the potential for considerably more utility because it can be called into play when the government is unwilling, rather than unable, to designate the false statement. Consider the following scenario:

120. These dilemmas are difficult enough if, as is implicit in the discussion, it is assumed that the lawyer "knows" that the witness testified falsely. As Justice Stevens noted: A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury . . . should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. *Nix v. Whiteside*, 475 U.S. 157 (1986) (Stevens, J., concurring).

121. Pub. L. No. 94-550, 90 Stat. 2535 (codified as amended at 18 U.S.C. § 1623 (1982)).

122. The False Declaration Statute was enacted as Title IV of the 1970 Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 932 (codified as 18 U.S.C. § 1623 (1982)) and was amended in Pub. L. No. 94-550, 90 Stat. 2535.

123. "[W]e are going to try to make S.30 [The Organized Crime Control Act] the vehicle for the legislation that is directed primarily at organized crime and providing additional weapons with which to combat organized crime." See *Hearings*, *supra* note 29, at 107 (remarks of Sen. McClellan). "The purpose of the [Organized Crime Control Act] is to correct certain defects in our evidence gathering process."

124. See *Hearings*, *supra* note 29.

125. By facilitating perjury prosecutions, the False Declaration Statute was intended to enhance the reliability of testimony before the federal courts and grand juries and afford greater assurance that "testimony obtained in grand jury and court proceedings will aid the cause of truth." S. REP. NO. 617, 59 (1969). See *Dunn v. United States*, 442 U.S. 100, 107-08 (1979).

Government calls Witness, who testifies at a grand jury proceeding. In response to the prosecutor's questions and in the absence of objections or cross-examination, Witness implicates Defendant in criminal activity.¹²⁶ At the trial of Defendant, however, Witness changes or recants his grand jury testimony. As a result, Defendant is acquitted. Government charges Witness with perjury.

Under the General Perjury Statute, Government must choose which of Witness's statements to charge as perjurious. This is sometimes a painful choice: If Government charges that the grand jury testimony was perjurious, Government would be contradicting the position it took at Defendant's trial, which would be institutionally embarrassing. If it charges that the trial testimony was perjurious, it faces proving the truth of Witness's grand jury testimony, something that it has just failed to prove in Defendant's trial. The problem under the General Perjury Statute is not so much that the Government does not know which version of Witness's story to challenge; it is rather that any specific challenge would be difficult to maintain.

The inconsistent statement provision of the False Declaration Statute resolves this dilemma. The statute does not require that, in order to prosecute under subsection (c), the government be ignorant of the truth, or have no corroborating evidence. The government can simply charge and prove that the witness made inconsistent statements, then sit back and watch him try to explain the discrepancy. With the sublime indifference of a logician exposing a contradiction, the prosecutor need take no embarrassing positions as to which of the witness's statements was really true.

By simplifying the prosecution of grand jury witnesses who change their testimony at subsequent trials, Congress hoped to strengthen the government's ability to hold wavering grand jury witnesses in line at the trials of grand jury target defendants.¹²⁷ The provision nails such witnesses to their grand jury testimony, testimony that was taken in the absence of confrontation and without objections or contemporaneous cross-examination by the defendant, testimony that might have been quite different if taken under the adversarial conditions of trial. The government can meet any substantive change in the witness's story with a charge of false declaration under the inconsistent statement provision. This threat diminishes the utility of the defendant's constitutional¹²⁸ right of cross-examination by preventing his counsel from obtaining concessions of error during the cross-examination of such witnesses at the defendant's trial.

Congress had these strategic effects of the statute in mind when it enacted the statute. Part of the statutory purpose was to prevent grand

126. It is assumed that the prosecution does not have reason to believe that the witness's grand jury testimony is perjurious. A conviction obtained by the government's knowing use of perjured testimony violates the fifth amendment due process clause. *Giglio v. United States*, 405 U.S. 150 (1972).

127. See *Hearings*, *supra* note 31.

128. *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

jury witnesses from changing their testimony in response to underworld pressure.¹²⁹ Yet any statutory threat of sufficient magnitude to offset underworld threats of personal violence would seriously inhibit a witness who desired to change his grand jury testimony for less compelling reasons, e.g. that it was simply mistaken. And in civil litigation, where underworld threats are a rarity, the potent threat of the inconsistent statement provision is even more distortive.

Ironically, caselaw suggests that witnesses in criminal cases who want to change their grand jury testimony may be able to nullify the effect of the provision anyway. A well-advised grand jury witness who, because of intimidation or less venal motives, desires to testify differently at the defendant's trial has many alternatives. If he wishes to say nothing at the defendant's trial, he can simply invoke the fifth amendment when questioned at that trial. His basis for invoking the privilege would be his fear of a prosecution for perjury before the grand jury.¹³⁰ If the witness thus refuses to testify, the government cannot introduce the witness's grand jury testimony, which is hearsay.¹³¹ Nor can it compel the witness to testify over his objection without granting him use immunity.¹³²

After being granted use immunity at the trial, the witness can disclaim his grand jury testimony without running afoul of the inconsistent statement provision.¹³³ The government cannot use immunized trial testimony in prosecuting the witness for perjury at the grand jury,¹³⁴

129. See *Hearings*, *supra* note 31.

130. Although a witness may not claim the fifth amendment for fear that what he is about to say may be perjurious, *United States v. Partin*, 552 F.2d 621, 632 (5th Cir. 1977), *cert. denied*, 434 U.S. 903; *United States v. Wilcox*, 450 F.2d 1131, 1141 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972) (dictum), he may invoke the privilege if he fears that the testimony he will give would subject him to liability for perjury in an earlier proceeding. *Wilcox*, 450 F.2d at 1141; *Glickstein v. United States*, 222 U.S. 139 (1911). The prior testimony does not waive the fifth amendment for this purpose. *Wilcox*, 450 F.2d at 1141. If the witness intends to testify inconsistently with prior testimony, the privilege would therefore be appropriate.

131. See FED. R. EVID. 801(d)(1) (limiting use of prior statements to those made by a declarant who testifies at the trial or hearing and is subject to cross-examination concerning the statement).

132. 18 U.S.C. § 6002 (1986).

133. The Federal Immunity Statute provides in part that if a witness is compelled to testify over his claim of a fifth amendment privilege, "no testimony or other information compelled under the order [compelling such testimony] (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002 (1982) (emphasis added). False testimony of an immunized witness may be admitted in a prosecution for perjury in giving the testimony introduced as evidence of the *corpus delicti*. *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Mandujano*, 425 U.S. 564, 584-85 (1976). An immunized witness's truthful testimony can be introduced in a perjury prosecution for false testimony given under the same grant of immunity and before the same tribunal. *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) ("[Immunized] testimony remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his fifth amendment privilege absent the grant.") A witness, however, may not assert the fifth amendment privilege to avoid giving testimony that will be perjurious when given.

134. *United States v. Doe*, 819 F.2d 11 (1st Cir. 1987) (immunized grand jury testi-

nor can it charge the witness under the inconsistent statement provision.¹³⁵ The government must either charge that the trial testimony was a false declaration (and in the witness's trial for this charge, the government can use his grand jury testimony whether immunized or not)¹³⁶ or it can charge that the grand jury testimony was a false declaration and attempt to prove its case by other evidence. But in neither case is the inconsistent statement provision of any use.

A second strategy the reluctant witness can use is to affirm the grand jury testimony on direct examination, then to refuse to testify on cross-examination by defendant's counsel, claiming the privilege of the fifth amendment. If, as a result of the claim of privilege, the defendant is not permitted to cross-examine as to the substance of the testimony given on direct examination, the defendant is entitled to have the testimony stricken.¹³⁷ The witness, unless granted immunity, need not contradict his grand jury testimony using this technique. Nevertheless, the government loses the use of it.

Even if the witness does not invoke the fifth amendment or insist on immunity, the inconsistent statement provision does not prevent the effective disavowal of prior testimony through a claim of uncertainty or a loss of memory. The provision refers to statements that are so "inconsistent to the degree that one of them is necessarily false."¹³⁸ A witness who professes to a failure of memory between the grand jury proceeding and the trial has not satisfied this standard; memories can fail.¹³⁹ Faced with such a loss of memory, however, the government can introduce the witness's grand jury testimony at the defendant's trial.¹⁴⁰ And this technique is riskier for the witness, who can be prosecuted for perjury in

mony cannot be used as evidence to prove charge of perjury in prior appearance); *United States v. Cintolo*, 818 F.2d 980, 988 n.5 (1st Cir. 1987), *cert. denied*, 108 S. Ct 259; *United States v. Seltzer*, 621 F. Supp. 714 (N.D. Ohio 1985), *aff'd*, 794 F.2d 1114 (6th Cir. 1986).

135. *In re Grand Jury Proceedings*, 644 F.2d 348 (5th Cir. 1981); *United States v. Patrick*, 542 F.2d 381, 384-86 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *United States v. Alter*, 482 F.2d 1016, 1018 (9th Cir. 1973). *Cf. United States v. Dunn*, 442 U.S. 100 (1979) (approving prosecution under subsection (c) where the second inconsistent statement admitted the falsity of the immunized grand jury testimony).

136. *United States v. Seltzer*, 794 F.2d 1114 (6th Cir. 1986); *United States v. Pisani*, 590 F. Supp. 1326 (S.D.N.Y. 1984).

137. *See supra*, note 11. *Cf. United States v. Pelusion*, 725 F.2d 161, 169 (2d Cir. 1983) (it is not necessary to strike the direct testimony of a government witness who invokes the fifth amendment on cross-examination on a collateral matter not related to his direct testimony).

138. 18 U.S.C. § 1623(c) (1982).

139. *United States v. Flowers*, 813 F.2d 1320 (4th Cir. 1987) (reversing conviction under section 1623(c) where, although witness testified to different account in second proceeding, upon cross-examination he readily admitted that the differences in his testimony were due to a faulty memory and that his memory was better in the prior proceeding).

140. Under Federal Rule of Evidence 801, the government can introduce the text of the grand jury testimony of a witness who professes loss of recollection because the witness is deemed to be available for defendant to cross-examine. *California v. Green*, 399 U.S. 149 (1970); *United States v. Russell*, 712 F.2d 1256, 1258 (8th Cir. 1983). *See United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 (3d Cir. 1977) (distinguishing a witness who does not recall grand jury testimony at trial from one who pleads the fifth amendment — the latter's testimony may not be introduced).

denying memory. Again, however, the inconsistent statement provision provides no way of forcing the immunized witness to testify truthfully.

Viewed strictly as a weapon in the war on organized crime, the inconsistent statement provision would appear to offer the government minimal strategic gain to offset its potential for harm to other trial testimony.

These observations must, however, be qualified because of the way in which the current statutes are enforced. The behavioral effect of statutes is modified drastically by the exercise of prosecutorial discretion. Statutes that are enforced according to unstated standards of prosecutorial discretion no longer mean what they say, or even what courts say they say. Today's federal prosecutors do not seek indictments under the present statute against witnesses in civil cases who, on cross-examination, decide, well, yes maybe it was raining on the day of the accident after all.

An impressionistic survey of the reported cases suggests that the inconsistent statement provision is applied mainly to professional criminals. Strict enforcement of the inconsistent statement provision across the board would be too likely to ruin a good weapon in the war on organized crime. The indeterminacy introduced by the exercise of prosecutorial discretion thus makes both critique and justification of the rule difficult.

Nevertheless, written law should conform to law in practice as much as possible, if only to give the citizen and her attorney some idea of the risks that actually attend their options. To hide the illogic of the False Declaration Statute behind the benevolent judgment of the federal prosecutors weakens the rule of law. If the False Declaration Statute is to have a narrow scope, it should be amended to reflect that scope.

IV. A PROPOSAL TO AMEND THE FALSE DECLARATION STATUTE

The twin problems of overbreadth—the tendency of the statute to reach innocent testimonial inconsistencies—and counterproductivity—the inhibition of desirable correction of both perjurious and non-perjurious testimony—both arise because the federal perjury statutes emphasize deterring initial perjury at the expense of encouraging mitigation of the effects of perjury through recantation. The root conflict between the deterrence and mitigation policies of the statutes has created an incoherent approach to testimonial inconsistency.

At a minimal cost in deterrence, the problems of overbreadth and counterproductivity could be ameliorated by a more uniform policy liberally permitting testimonial corrections. Statutory amendments that might accomplish this are described below:

1. Make the inconsistent statement provision of the False Declaration Statute inapplicable to statements made in the same proceeding.

Given the abolition of the two witness rule, which simplified the proof of false declaration, the additional or marginal value of the incon-

sistent statement provision is slight in comparison to its cost. It will usually be unnecessary to secure convictions because, unlike prosecutions under the General Perjury Statute, prosecutions under the False Declaration Statute can proceed on the basis of the witness's contradictory statement alone.

The inconsistent statement provision has little value when applied to inconsistencies in the same proceeding, given the countervailing value expressed in the recantation provision. The purely formal differences between inconsistent statements and recantations do not justify inhibiting or punishing testimonial corrections that are made without the necessary shibboleths.

2. Amend the Recantation Provision by (1) deleting both the "substantial effect" and "disclosure" requirements; (2) permitting a witness to designate as a recantation any statement that directly contradicted a former statement for which the defendant is charged for false declaration or perjury; (3) making recantation a defense to any charge under the General Perjury Statute; and (4) providing that recantation would be untimely if it does not occur in the same proceeding as the statement recanted or if it occurs after indictment for perjury in making the statement recanted.

These changes express a liberalized rule permitting mitigation of perjury before the end of the proceeding in which it was uttered. Under the proposed amendments, the existence of a recantation will not turn on the precise form of the testimony with which prior testimony is disavowed. A witness could designate what were formerly inconsistent statements within the same proceeding as a statement and its recantation, regardless of the form of the second of the two statements. As a result, a witness would be bound only by the last version of his testimony within a given proceeding. Most importantly, the amendment would permit witnesses to revise innocent testimonial errors without risking liability under the federal perjury laws.

The statute would offer the perjured witness a real incentive to recant because recantation would eliminate the risk of prosecution. The proposed amendments eliminate the uncertainty about whether the recantation timing prerequisites were satisfied, since the recantation would be timely if it occurred at any time before the proceeding ended and before the witness was indicted.¹⁴¹ The Catch-22 liability to a charge under the General Perjury Statute would be eliminated.

This change would also reduce the conflict between an attorney's duties to disclose falsehood to a tribunal and her duties to clients or witnesses who may have testified untruthfully. Because a witness could change his testimony within the same proceeding without penalty, an attorney who believed that a witness had testified falsely could urge the

141. By permitting recantations until the end of the proceeding, the proposed amendment to the federal statute would avoid the problem raised by the Model Penal Code of defining the same occasion or "line of questioning" during which testimonial revisions are permitted.

witness to rectify the error on the record without, in effect, advising the witness to create the very evidence that could convict the witness of a crime. Even if the attorney were required to disclose the falsity to the tribunal, the witness would still have an opportunity to avoid liability by subsequent recantation prior to an indictment because recantation would no longer be barred by the disclosure of the falsehood to the tribunal.

A. *Evaluation of Proposed Changes*

The proposed amendments can be criticized for two reasons: they do not go far enough in eliminating the evils associated with perjury law's bias toward consistency and they go too far in reducing the deterrent effect of the present scheme. The proposed changes admittedly do not eliminate the evils associated with the elevation of consistency over truth where testimony is given in more than one proceeding. A grand jury witness can still be prosecuted for testifying differently at a subsequent trial. If a grand jury witness fails to recant a false declaration before the term of the grand jury expires, he cannot correct the error at a subsequent criminal trial and can be charged under the inconsistent statement provision. This inability might well prevent a witness from testifying truthfully at the trial or subsequent proceeding. However, the prospective gain from recantation is greatly reduced after the tribunal relies on the lie. In addition, permitting a witness to recant at any time after the end of the proceeding in which he lied would permit risk-free perjury.¹⁴²

The proposed amendments do not prevent a witness who recants from being prosecuted for lying during his recantation,¹⁴³ nor do they prevent the government from using the first declaration in such a prosecution. In some cases, this risk could inhibit a desirable revision of erroneous testimony. Otherwise, however, the witness would be able to lie with impunity during recantation.

Many have voiced the fear that an unlimited right of recantation might encourage perjury by those who think it possible that their lies will be exposed, if at all, during the proceeding.¹⁴⁴ Such witnesses might be deterred under the original statute because exposure would

142. The interests at stake in the grand jury proceeding differ from those at stake in other contexts because of the effect on the non-witness's (the prospective criminal defendant's) right of confrontation. A possible solution, consistent with at least part of the congressional intention, would be to make the inconsistent statement provision applicable only to grand jury witnesses who had testified under a grant of immunity. This rule would give the government considerable control over such witnesses. A grant of immunity gives the criminal defendant against whom the witness testifies grounds for impeachment that partially offset the governments prosecutorial power over the witness.

143. It should be noted that prosecutors and courts are generally mistrustful for the witness who recants incriminating testimony. Frossard, *When the Accuser Recants: People v. Dotson*, 14 A.B.A. J. SEC. LITIG., No. 4, 11, 12 (1988). Yet, while experience may teach that such recantations are usually false, the inconsistent statement provision and the recantation provision do nothing to inhibit them in the same proceeding.

144. *United States v. Moore*, 613 F.2d 1029 (D.C. Cir. 1979).

instantly make recantation impossible. They would perceive the risk of prosecution as much smaller if they could recant after exposure of the falsehood.

This fear seems to be exaggerated. For one thing, the perjury is "risk free" only if the perjury is exposed during the proceeding and not afterward, when the possibility of recantation has passed. The perjurer who does not anticipate disclosure until after the proceeding is over will not be affected by the proposed statutory change because it will not affect his likelihood of being prosecuted. In addition, critics of liberalized recantation tend to ignore the effect of uncertainty on the potential perjurer's calculations. The uncertainty is most pronounced for witnesses contemplating perjury before a grand jury, where testimony is taken in secret. At the time when the witness must decide whether or not to lie, he must estimate the likelihood that he can learn of such secret testimony and recant before he is indicted by the grand jury. This requires estimating the combined chances that (1) his lie will be exposed, (2) the prosecutor and grand jury will believe the exposing testimony and (3) the witness will learn of the lie and be able to recant before an indictment for perjury against him is handed down or the jury's term ends. Perjury under such uncertainty of risk is not "risk free."

The uncertainty of risk is less for witnesses testifying at trial, but such witnesses must still evaluate the likelihood that the conflicting evidence will be believed and the likelihood that the witness can recant before being indicted for perjury. The witness must be concerned not with his credibility before tribunal in which the perjury is committed but with his credibility before a grand jury and another tribunal concerned with his perjury. The witness cannot know whether the perjury will ultimately "succeed" until after the end of the original proceeding. Again, such perjury is not "risk free."

Admittedly, and despite the uncertainty, it is likely that permitting recantation after exposure may increase perjury by some amount. Even so, it is plausible that the overall gain that the amendment would produce in accurate testimony would exceed the loss. The number of non-perjurious witnesses who have occasion to change their testimony is far greater than the number of potential perjurers whose decision to lie will be affected by the liberalized recantation provision. Untruth can have the same harmful effect on the judicial process whether it is innocent or intended. The potential harm of the present statutory scheme appears to outweigh its benefit by a large margin.

The proposed amendments would make the law of perjury more congruent with civil litigation practice as well. In the federal civil lawsuit, to which the False Declaration Statute also applies, witnesses are expressly permitted to change sworn testimony that they believe to be in error. A strict avoidance of inconsistent testimony would harden initial positions far more than is desirable.

The proposed amendments would rationalize the incentives offered federal court witnesses at little cost in prosecutorial enforcement. While

they would not solve all the problems associated with the attempt to compel honest behavior by threats of punishment, they offer the maximum encouragement to such behavior consistent with the punitive, instrumentalist regime of criminal law.

CONCLUSION

In enacting the False Declaration Statute, Congress gave little attention to the effect of the statute on the average federal witness. Its threats against inconsistent testimony are probably not what Congress wanted such witnesses to bear in mind during cross-examination. It is certainly doubtful that Congress intended to enact a rule that encourages all well-counseled witnesses in federal court to take the fifth amendment as soon as cross-examination begins. Whatever strategic advantage that the prosecution gains from such a rule is largely offset by common strategies that well-represented dishonest witnesses can employ.

The federal perjury statutes should incorporate a more accurate recognition of the realities of the trial experience. Consistency is not a testimonial virtue when it comes at the expense of truth. Inconsistency is often the mark of the honest mind grappling with the frailties of human memory. The law of perjury should not threaten such candor without better justification.

